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IN THE

**SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, A. D. 1943.

No. 575

ISRAEL A. ABRAMS, ET AL., BERNARD SHULMAN
AND MEYER ABRAMS,

Petitioners,

VS.

HENRY A. SCANDRETT, WALTER J. CUMMINGS
AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY
OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY,

Respondents.

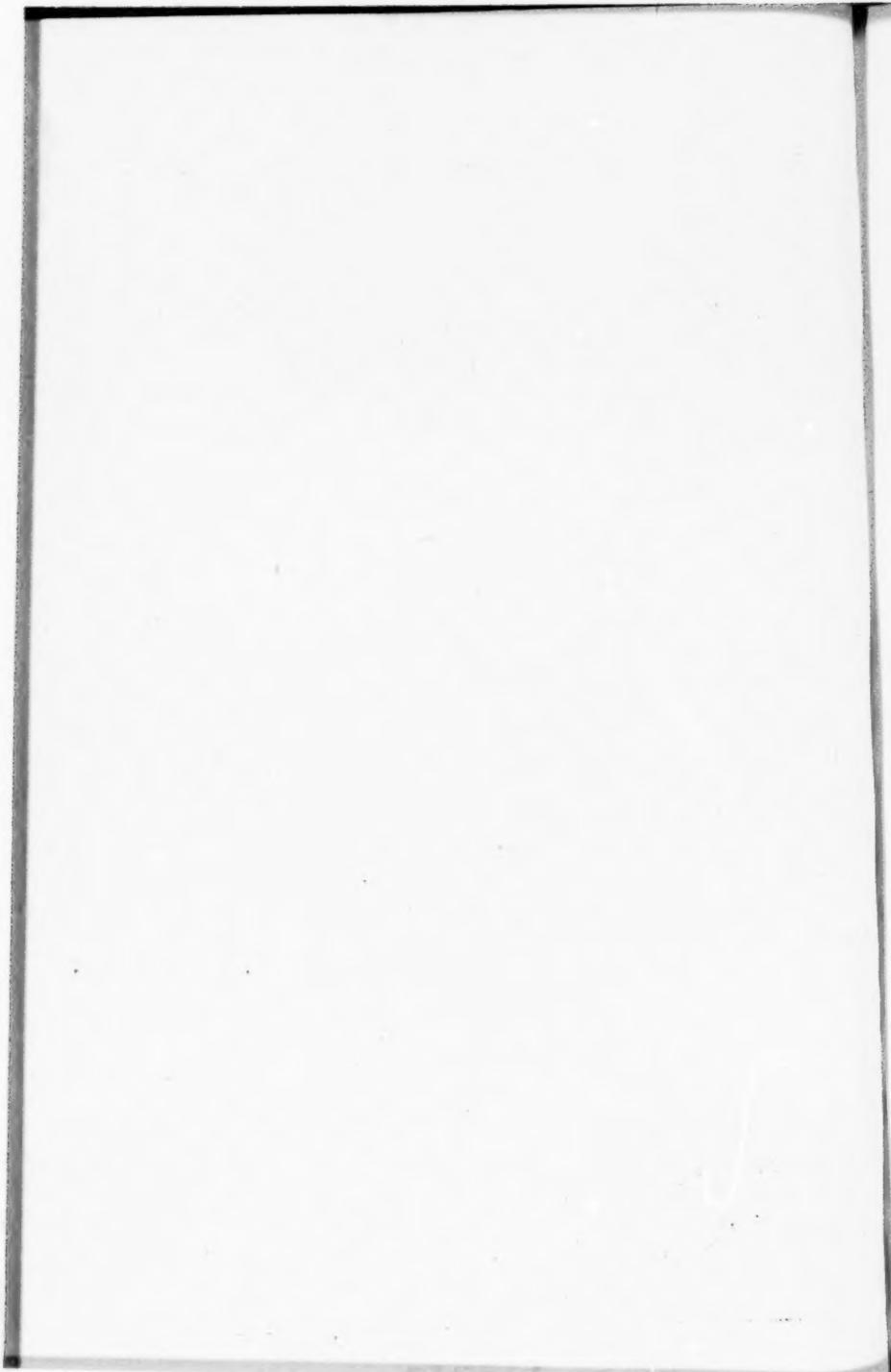
**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF
IN SUPPORT THEREOF.**

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I N D E X.

	PAGE
<i>Petition:</i>	
Statement of the Matter Involved.....	2
The Material Facts	4
The Questions Presented	8
Reasons for the Allowance of the Writ.....	9
Prayer for Relief	12

Brief:

Jurisdiction Invoked	13
Opinions Below	13
Errors Relied On	14

SUMMARY OF ARGUMENT.

I.

The Commission's Report Lacked Basic Findings and It Was the Duty of the District Court to Reject Its Report and to Make Essential Findings Under Rule 52 (a). Its Mere Statement That the Report Was Sustained By Substantial Evidence Was Insufficient and It Was the Duty of the Court of Appeals to Reverse Its Order and Either to Adopt the Proposed Findings Or to Direct the District Court to Make the Proper Findings.....

16

(a) A report of a Commission which lacks essential findings must be rejected.....

16

(b) The report of the Commission lacked the basic facts, and it was the duty of the District Court to sustain the objections and to reject its report, and the Court of Appeals erred in affirming its order.....

17

II.

The Proposed Findings Were Supported By the Undenied Proof and It Was the Duty of the Court to Adopt the Findings Which Would Have Resulted in the Opposite Conclusion Calling for Rejection of the Report

19

(a) It was the duty of the Court to adopt the proposed findings which would have led to the irresistible conclusion that the report should be rejected

20

(b) The Court of Appeals was unable to find the substantial evidence to support the report.....

37

III.

The Court Clearly Erred in Not Following the Proposed Propositions of Law

48

(a) It was the duty of the Court to hold that it was not the intent of Congress to deprive the courts of their functions and the jurisdiction of the Commission was confined to the fixing of a ceiling within which limits the Court may allow reasonable compensation

48

(b) "Maximum" and "Nothing" are not synonymous

49

IV.

While Compensation May Not Be Allowed for Services Rendered By Intervenors Which Made No Contribution to the Proceedings Or Plan, Yet the Compensation Does Not Hinge on the Success of Such Contributions

54

(a) Section 77, as distinguished from 77B, authorizes allowances of expenses to parties and fees to their attorneys, regardless of benefits rendered to the estate.....	57
(1) There is no requirement under Section 77 that attorneys representing creditors succeed in their efforts in order to entitle them to compensation	57
(2) Parties to the proceedings or those who were let in by intervention are entitled to their expenses and the reasonable fees for their attorneys, regardless of the success of their efforts	59

V.

Rule 52 (a) Was Mandatory Upon the District Court, and Its Order Must Be Reversed Because of the Violation of the Rule.....	61
(a) Rule 52 (a) was mandatory upon the District Court and a reversal must follow for its violation of the rule	62
(b) Rule 52 (a) is expressly applicable to the instant case	62
Conclusion	70

TABLE OF CASES.

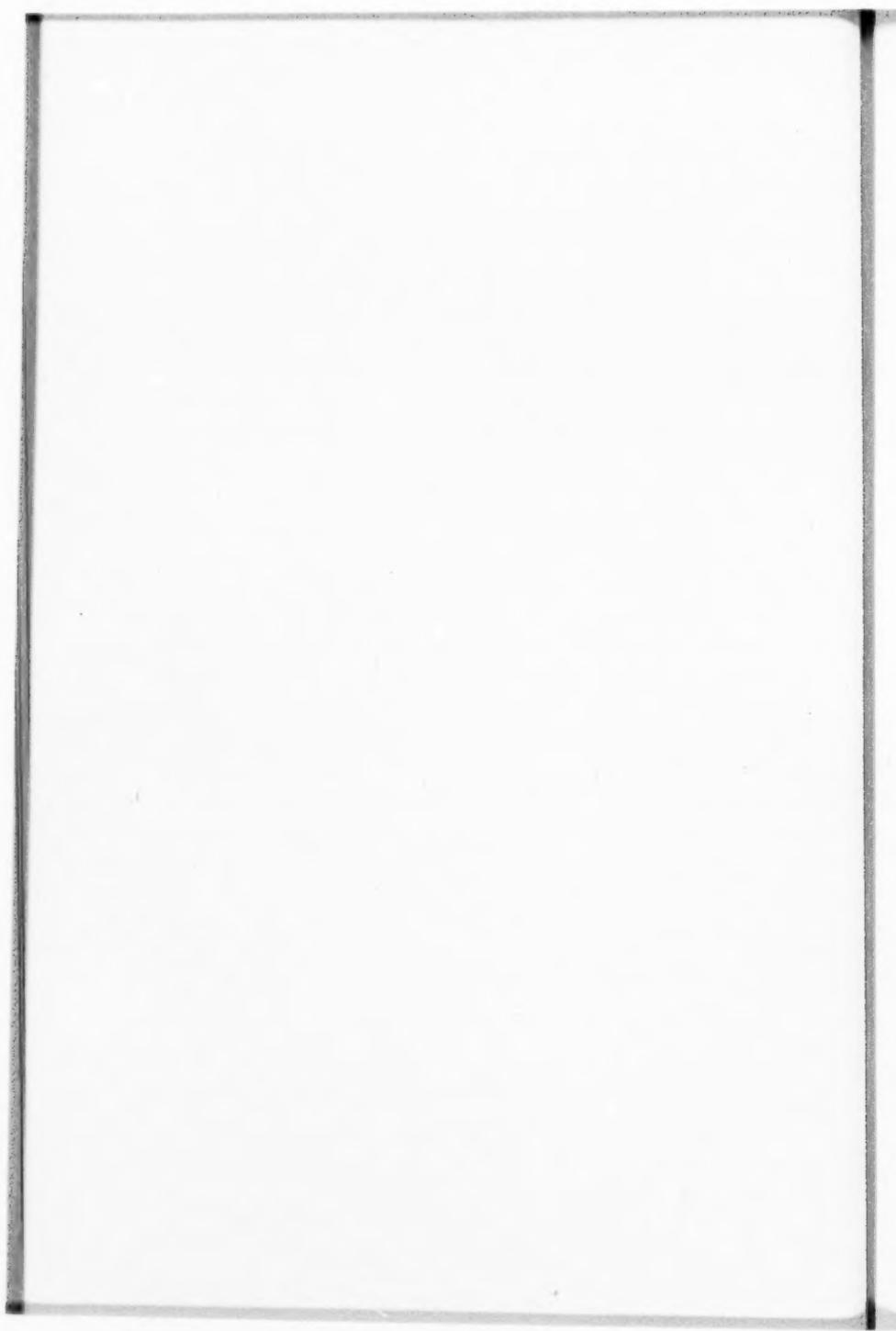
Abrams v. Chicago, M., St. P. & P. R. Co., 121 F. (2) 371	2, 13
Abrams v. Chicago, M., St. P. & P. R. Co., 138 F. (2) 386	13
Abrams v. Group of Institutional Investors, et al., 124 F. (2) 754	9, 60
Albert Dickinson Co. v. Dickinson Industrial Site, 104 F. (2) 771	47, 55

Ames Furniture Co., Inc., C. C. H. Reports, Par.	70
44,490	70
American Mail Line, In re, 115 F. (2) 196	60
Beaumont, S. L. & W. F. Co. v. United States, 282	
U. S. 74	16
Building Development Co., In re, 98 F. (2) 844	59
Burdett, In re George R., Inc., C. C. H. Reports, Par.	
54,484	70
Campbell v. Green, 112 F. (2) 143	12, 53
Carter Oil Co. v. McQuigg, 112 F. (2) 275	39
Chicago North Western Ry. Co., 121 F. (2) 791	53
Continental Oil Company v. National Labor Relations	
Board, 113 F. (2) 473	43
Croghan v. Savings Trust Co., 85 S. W. (2) 239	51
Great Northern R. R. Co. v. Sullivan, 294 U. S. 458	18
Group of Institutional Investors v. Abrams, et al., 318	
U. S. 523	9
Hazel v. Atlas Glove Co., 127 F. (2) 109	43
Helfer v. Corona Products, Inc., 127 F. (2) 612	63
Hill v. Ohio Casualty Co., 104 F. (2) 695	37
Indianapolis Power & Light Co. v. National Labor	
Relations Board, 122 F. (2) 757	43
Irving-Austin Bldg. Corp., 100 F. (2) 574	55
Kelly v. Jones, 290 Ill. 375	64
Kelly v. Everglades Drainage District, 319 U. S. 415	63
Kucoga Land Co. v. Kentucky River Coal Co., 119 F.	
(2) 894	38
Labor Board v. Columbian Company, 306 U. S. 292	40
Mammina v. Homeland Insurance Co., 371 Ill. 555	64
Morgan v. U. S., 298 U. S. 468	16
Moweaqua Coal Corp. v. Industrial Commission, 360	
Ill. 194	51
National Labor Relations Board v. Union Pacific, 99	
F. (2) 153	41
National Labor Relations Board v. Boss Mfg. Co., 107	
F. (2) 578	43

National Savings & T. Co. v. Shutack, F. F. D. S.	52
(a) 7	68
New York N. H. R. Co., 46 F. Supp.	214
New York N. H. R. Co., 46 F. Supp.	236
Perry v. Bauman, 122 F. (2)	409
Phelps Dodge Corporation v. National Labor Board,	
313 U. S.	177
Rassieur et ux. v. Commissioner of Internal Revenue,	
129 F. (2)	820
Reconstruction Finance Corporation v. Bankers Trust	
Co., 318 U. S.	163
Right Printing Co. v. Stevens, 107 Vt.	359
Saginaw Broadcating Co. v. Federal Communica-	
tions Commission, 96 F. (2)	554
Shannon v. Retail Clerks Int. P. Assoc., 128 F. (2)	
553	62
Securities Commission v. Chenery, 318 U. S.	80
Stevenson v. Flannery, 117 P. (2)	717
U. S. v. B. & O., 293 U. S.	454
U. S. v. Forness, 125 F. (2)	928
	62

OTHER CITATIONS.

Rule 52 (a)	61
Section 77 (e) 12	18
26 R. C. L., Section 97	37
4 Corpus Juris, Page 645	68
5 Corpus Juris, Page 26	68



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No.

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COMPANY,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Petitioners, Israel A. Abrams, et al., a group of Adjustment Mortgage Bondholders, and Meyer Abrams and Bernard Shulman, their counsel, pray for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review its judgment of November 4, 1943.

STATEMENT OF THE MATTER INVOLVED.

The petitioners, consisting of a group of Adjustment Mortgage Bondholders, were allowed to intervene before the Interstate Commerce Commission, as well as before the District Court in the early part of the proceedings, in August, 1935. The other petitioners, Meyer Abrams and Bernard Shulman, are their counsel who appeared in their behalf throughout the proceedings.

The petitioners, counsel for the group of the Adjustment Mortgage bondholders, performed services before the District Court as well as before the Interstate Commerce Commission from the period commencing July 1, 1935, to May 1, 1940, covering in excess of 1,000 hours and they asked an allowance of \$12,500.00 for such service. (R. 13, 21). They also asked for reimbursement of expenses in the amount of \$436.80 (Tr. 22-23; R. 21)*

The Interstate Commerce Commission fixed "nothing" as the "maximum limit" for the expenses incurred and for the compensation requested. The District Court approved its order on November 13, 1940, when it overruled the objections of the Petitioners on the ground that no matter how beneficial the services were, the Court was powerless to make any allowance above the "maximum limit" of "Nothing" (R. 9). Its decision was affirmed by the Seventh Circuit on May 20, 1941, and a rehearing was denied on June 12, 1941 (121 F. (2d) 371). This Court denied *certiorari* in case 631 on November 10, 1941 (314 U. S. 679), and denied a rehearing on December 8, 1941 (314 U. S. 714). Thereafter, on February 8, 1943, this court allowed a Writ of

* The reference "R" is to the printed record on the former appeal in Nos. 2529 and 2537, which records were filed here in case No. 631, and were made a part of this record by the order of the court (Tr. 52). The reference "Tr." is to the printed record in this case.

Certiorari in another case which involved the construction of Section 77 (e) 12. In deciding that case this Court concluded that the Seventh Circuit erred in its construction of Section 77 (e) 12 on the appeal taken by these petitioners (*Reconstruction Finance Corp. v. Bankers Trust Co.*, 318 U. S. 163).

On February 17, 1943, petitioners applied to the Seventh Circuit for another rehearing based on the decision of this court in the *Reconstruction Finance case, supra*. The Court of Appeals was at first of the opinion that it was without jurisdiction to grant a rehearing and on February 18, 1943, it denied the application. However, upon a subsequent reconsideration, it concluded that it had jurisdiction. It vacated the denial of the rehearing on March 22, 1943, granted a rehearing, and reversed the order of the District Court with directions to examine the evidence to see if there was substantial evidence to support the findings of the Commission (Tr. 10-11).

Upon the filing of the mandate issued by the Court of Appeals reversing the previous order (Tr. 10-11) the matter was submitted to the District Court upon the record made before the Commission on the hearing on the fee application, and on the record in case Nos. 7529-7537 filed here in case No. 631, and on volumes I to V in case Nos. 7610-7617 filed here in case Nos. 13, 32.*

On June 8, 1943, the District Court filed *ex parte* "Findings and Conclusions" (Tr. 27) to the effect that there was "substantial evidence" to support the report of the Commission, and that the maximum of "nothing" was sustained by "substantial evidence". It entered an

* The Court of Appeals permitted the reference to such volumes without reprinting them (Tr. 52).

4

order simultaneously therewith, overruling the objections and sustaining the Report (Tr. 28). On June 16, 1943, Petitioners moved to vacate the *ex parte* "Findings of Facts and Conclusions" on the ground that they were not in compliance with Rule 52 (a), and tendered to it "proposed findings" and "propositions of law" (Tr. 28-32). The Court took the matter under advisement, and on June 21, 1943, it denied the motion to vacate its findings and conclusions, and rejected the proposed findings and conclusions of the petitioners (Tr. 23).

The order of the District Court was affirmed by the Circuit Court of Appeals on November 4, 1943 (Tr. 56-61) and on November 24, 1943, it denied a rehearing (Tr. 63). This Petition is filed in order to review the decision of the Circuit Court of Appeals confirming the order below.

THE MATERIAL FACTS.

The Petitioners, a group of the Adjustment Mortgage Bondholders were allowed to intervene by the District Court on July 24, 1935, and by the Interstate Commerce Commission on August 3, 1935 (Tr. 14; R. 15) and were represented by the other petitioners, Meyer Abrams and Bernard Shulman as their counsel.

Petitioner Meyer Abrams appeared before the Interstate Commerce Commission at Washington, D. C., at the hearings held on the debtor's 1935 Plan, on August 5, 6, and 7, 1935 (Tr. 15). He actively participated in these hearings in the examination and cross-examination of witnesses and in the argument. He opposed the Debtor's plan of 1935 which was then sponsored by the Institutional Groups and other interests. His opposition was mainly on the ground that the railroad, which had

emerged a bankrupt from the previous reorganization in 1928, would not have improved its position as a result of the new reorganization under the 1935 plan, if adopted. He brought out the facts that while the general mortgage in the amount of \$138,788,800, was to remain "contingent" as to one-third of the interest payable from income, if any, this was no improvement, because such contingent interest was "cumulative" and became a definite obligation in 10 years. On default when such interest matured, there was the danger that the 50 year mortgage, amounting to \$106,000,000 (which was a junior lien) and the new stock which was to be given in exchange for the Adjustment Mortgage Bonds under the Plan, would be completely wiped out (Vol. I, pp. 401-420).

He also showed that the \$106,000,000 "50 year mortgage" which was changed to the extent that the entire interest became "contingent" also contained "cumulative" provisions maturing in 10 years. In the event of a default under that mortgage, the new stock (which was to be given in exchange for the Adjustment Mortgage Bonds) would be wiped out (Vol. I, pp. 405-415). It was shown by him that on the basis of the actual earnings for the period covering the years 1932, 1933 and 1934, there would be a deficiency of \$1,500,000 to meet the "fixed" interest charges under the proposed plan, besides the "contingent" interest (Vol. I, p. 403). It was therefore evident that the plan was unfeasible; that the railroad would have emerged a bankrupt from the reorganization, and would have been in no better position than it was when it emerged from the 1928 reorganization.

At the date of these hearings, the only other group which represented some of the Adjustment Mortgage

Bonds was the Institutional Group. But, this group held most of the senior securities and was primarily interested in such securities and sponsored the plan. Petitioners were the only group who opposed it. The Trustee under the Adjustment Mortgage Bonds was not a party to the proceedings in 1935 on the debtor's plan. This Plan also contemplated a Voting Trust, and the Voting Trustees were selected in advance of the filing of the plan so that no representation was given to the class of the Adjustment Mortgage Bonds which debt aggregated approximately 35% of the total debt of the debtor (Tr. 17; Vol. I, pp. 413-414).

The debtor and its counsel sponsored the Plan, as being fair, equitable and feasible at the hearings in 1935. They were then supported by the Institutional Groups. The record was closed upon which the Commission was to file its report on the Plan. On June 16, 1937, the debtor asked to reopen the case and conceded that the Plan was not feasible because of the cumulative features and that changes in the Plan were deemed necessary (Vol. II, p. 600). Petitioners were not represented at that hearing. The Institutional groups even then contended that the Plan was fair and feasible (Vol. II, p. 630). In September, 1937, the Debtor and the Institutional Groups joined forces in urging an indefinite delay on the ground that changes were necessary. This was opposed by Petitioners who urged that the Commission should formulate a plan of its own. At a subsequent hearing held September 20, 1937, further delay was sought, which was opposed by Petitioners (Vol. II, p. 636). At this hearing Petitioner Meyer Abrams pointed out that it was necessary to change the complete corporate structure and to eliminate the Divisional mortgages (Vol. II, pp. 666-667). The Commission sustained Mr. Abrams in denying a

further continuance and closed the hearing. By an *ex parte* order further time was granted to file an amended Plan (Tr. pp. 16-17).

An amended Plan was filed on January 10, 1938, which eliminated some of the objectionable features of the Debtor's Plan. Petitioners participated in the hearing before the Commission in February 1938 on the Amended Plan and pointed out its objectionable features. They were active in producing evidence and in arguing the points before the Commission (Vol. II, pp. 821-822). They also opposed the 5% on Series B of the new mortgage and urged 4½% (pp. 821-822), and opposed the Voting Trust.

The Examiner for the Commission later rendered his report, to which petitioners and other creditors filed objections. The objections were sustained, and on February 12, 1940, the Commission adopted a Plan of its own whereby the Adjustment Mortgage Bondholders were to receive Common Stock under the Plan. The Voting Trust was completely eliminated. Petitioners filed objections to certain features, and thereafter, on June 4, 1940, the Commission filed a Supplemental Report wherein it included a Voting Trust but gave representation to the Adjustment Mortgage Bondholders to name one of the trustees (239 I. C. C., p. 485). Petitioners filed their objections to the Plan in the District Court. Hearings were had, leading up to the entry of a decree approving the Report, from which Petitioners appealed and were successful in their appeal in that the Circuit Court of Appeals reversed the affirmance of the Plan (124 F. (2) 754). Subsequently, this Court reversed in part the order of the Circuit Court of Appeals (318 U. S. 523).

Petitioners filed their petition on May 25, 1940 (R. 13-22), and testified before the Commission (Tr. 13-26). The Commission filed its Report, fixing the "maximum" allowance of fees at \$312,624 (R. 71), which included a "maximum" of "Nothing" for fees and expenses to the Petitioners (R. 79). The District Court affirmed this order (Tr. 28), and upon appeal it was affirmed by the Circuit Court of Appeals (Tr. 62).

THE QUESTIONS PRESENTED.

1. Whether Rule 52(a) is applicable to the report of the Commission which lacked essential findings, and whether it was the duty of the District Court to comply with the rule or to adopt the proposed findings as presented by the Petitioners.
2. Whether the construction of § 77(c) 12 that the word "nothing" is included in the word "maximum" and that the Interstate Commerce Commission acted within its jurisdiction when it fixed "nothing" as a "maximum limit" was proper, and whether the Court of Appeals erred in upholding such action on the part of the Commission which is clearly contrary to the plain language of the Act.
3. Whether a report of a Commission may be affirmed on the ground that there is substantial evidence to support its findings upon a record which is barren of any evidence to support it and where the alleged substantial evidence is based on an unwarranted assumption that the Commission knew everything that transpired before it and, therefore, its finding may said to be supported by substantial evidence, when no such evidence appears in the record.

4. Whether the District Court merely sat as a court of review in performing its functions under § 77(c) 12 to allow compensation within the "maximum limit" as fixed by the Commission, or whether it was required to act independently and judicially in making the allowance, and its judicial functions were usurped by the Commission when it fixed "nothing" as the "maximum limit" and left no room for the court to exercise its sound judgment in making any allowance.

5. Whether the District Court merely passed on questions of law in performing its duty to make allowances under § 77(c) 12, and therefore no findings are required under Rule 52a, or whether it passed on the evidence in order to determine what allowances, if any, to make, and what expenses to allow, and in the absence of essential findings of the Commission it was required to make findings under Rule 52(a).

6. Whether attorneys who performed services in good faith in an attempt to obtain equitable treatment for the common benefit of the members of the class are to be denied any compensation because they were not finally successful in their efforts when the Commission changed its mind and incorporated a Voting Trust in its supplemental report and when the reversal of the order below which petitioner obtained (124 F. (2) 754) was upset by the decision of this Court (318 U. S. 523).

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. Petitioners were aggrieved by the original order when the maximum of "nothing" was affirmed on the misconstruction of the Act. They appealed and were unsuccessful. They applied for the writ of *certiorari* to this Court, which was denied. Two years later this Court

granted *certiorari* to another applicant and decided that the decision in the instant case was erroneous. Petitioners were compelled to devote a great deal of effort in order to obtain a rehearing and a reversal of the order. They finally succeeded in obtaining a reversal of the order with directions to examine the evidence to ascertain whether there was "substantial evidence" to support the report. The District Court filed so-called "Findings and Conclusions" which are neither "findings" nor "conclusions" and simply stated that there was "substantial evidence" (Tr. 27). Petitioners tendered to the Court "proposed findings" (pp. 29-32) which were sustained by the undenied proof. The District Court refused to adopt the findings and satisfied itself with the mere statement that there is "substantial evidence" to support the report.

In affirming the decision that there is such substantial evidence to support the report, the Court of Appeals was unable to point to anything in the record where the alleged substantial evidence is to be found. It rested its decision on the unwarranted assumption that the Commission was acquainted with the nature of the services, and that the "substantial evidence" consisted of the "assumption" that when the Commission fixed "nothing" as a "maximum" it knew that the services performed were worth "nothing." This "assumption" constitutes the "substantial evidence" to which the court below referred. There was no need to reverse the first order with directions to ascertain if there was "Substantial Evidence" to support the report if the assumption that the Commission knew what the services were and who benefited the estate existed, and the directions were but empty phrases and meaningless.

Such a decision is not in harmony with the decisions of this court in reviewing the findings of a Commission. Such a decision will make it impossible to obtain a review from any decision of an Administrative Agency for it may always be said that the Agency knew what it was doing. This assumption of the alleged knowledge is not a substitute for the "substantial evidence" which is required to support a Report, and which evidence is completely lacking in this case. The writ of *certiorari* should therefore be issued to review such a decision.

2. The construction of § 77(e) 12 that the Commission may fix "nothing" as a "maximum limit" is contrary to the concurring opinion of Mr. Justice Douglas in the *Bankers Trust case, supra*, and can find no support in the opinion of this court.

3. The decision that the question whether an Administrative Report is supported by substantial evidence involves only a question of law, when the evidence is not in dispute, is in conflict with the decision of the Eighth Circuit in *Rossieur v. Comm. of Int. Rev.*, 129 F. (2d), 820, holding that this involves a question of fact, and is also in conflict with the decision of the Court of Appeals for the District of Columbia, and to harmonize the decisions the writ should be issued.

4. The question whether Rule 52(a) is applicable to Reports of Commission which lack essential findings, is a question that deserves a determination by this Court.

5. The decision of the court that the Report of the Commission is supported by substantial evidence when no such evidence appears in the record, as conceded by the respondents, and the resort to "assumptions" as a substitute for "substantial evidence" is highly improper. This court repudiated the construction of the Seventh Circuit of § 77 (e) 12 on the previous appeal which was

taken by these petitioners, although it denied the writ to the petitioners in their application. The writ should now be issued to remove the improper construction of the statute as announced in the new decision.

6. The construction of the term "benefit" by the Seventh Circuit to the effect that it means "final success" and that attorneys who performed services in good faith and obtained results leading to a reversal of the order below by the Court of Appeals were not entitled to compensation because the Supreme Court finally reversed the decision of the Court of Appeals, is contrary to the spirit of the law. This construction will affect many members of the bar who have performed services in the various Railroad reorganizations, and who were finally unsuccessful because of the law which was announced by this court in the *Milwaukee and Western Pacific* cases on points which could not have been anticipated by the attorneys when they performed their services.

In the interest of the Bench and Bar a review should be allowed in order to obtain a proper construction of § 77(c) 12.

Prayer for Relief.

WHEREFORE, the above petitioners by their counsel jointly and severally pray the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to the end that its judgment may be reversed, and for such other relief as to this court may seem meet.

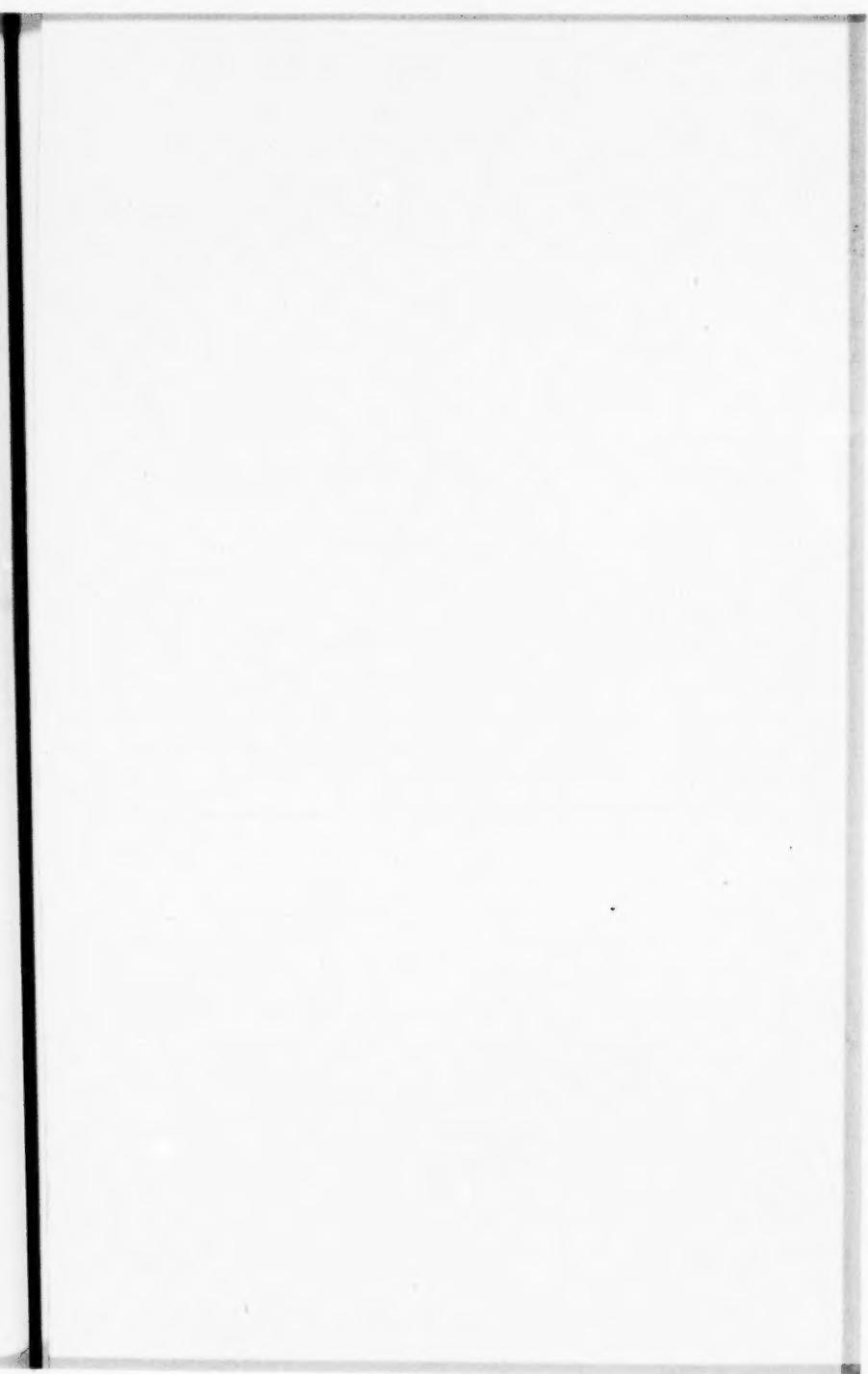
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BRIEF IN SUPPORT OF PETITION.**Jurisdiction Invoked.**

The jurisdiction to grant the writ of *certiorari* is invoked under § 240 (a) of the Judicial Code as amended by the Act of November 13, 1935 (43 Sta. 1938, 28 U. S. C. A. § 47). The judgment of the United States Circuit Court of Appeals was rendered November 4, 1943 and became final by the denial of a rehearing on November 24, 1943. The petition is filed within the statutory period.

Opinions Below.

The opinion affirming the order of the District Court which sustained the report of the Commission on the construction of the statute that the District Court could not set aside the maximum limit of nothing as fixed by the Commission under Section 77 (e) 12 is reported in 121 F. (2) 371. *Certiorari* was denied by this Court (314 U. S., 679) and a rehearing was also denied (314 U. S. 714).

The opinion vacating the denial of the rehearing and granting a rehearing, and reversing the order of the District Court with directions to examine the evidence and to ascertain whether the report was sustained by substantial evidence was reported in 138 F. (2) 386 and appears in the record (Tr. 6-9).

The opinion sustaining the order below which is the subject matter of the petition for the writ of *certiorari* was published in 138 F. (2) 433 and appears in the record (Tr. 56-61).

Errors Relied On.

1. The report of the Commission lacked basic findings and it was the duty of the District Court to reject its report and to make the necessary findings as submitted by the petitioners and it erred in filing findings and conclusions which are neither findings nor conclusions, and are not in compliance with Rule 52(a). It was the duty of the Court of Appeals to reverse the order below and either to adopt the proposed findings or to direct the court below to make the essential findings.
2. The statement of the District Court that there is substantial evidence to support the report is contradicted by the record. The Circuit Court of Appeals was unable to point to any evidence in the record tending to support the statement of the court. It resorted to an unwarranted assumption that the Commission knew what services petitioners performed and what benefits they contributed to the estate, and it erred in substituting such "assumption" for "substantial evidence", which cannot be found in the record.
3. The undenied proof conclusively shows that there is no foundation for the report of the Commission and for the order of the District Court. It was the duty of the Court of Appeals to reverse the order with directions to sustain the objections and to reject the report.
4. The Court of Appeals again misconstrued § 77 (c) 12 when it held that the word "nothing" was embraced in the word "maximum" and it was its duty to hold that the Commission exceeded its jurisdiction when it fixed "nothing" as a "maximum" in view of the fact that it was undenied that petitioners expended \$436.80 in traveling expenses from Chicago to Washington to attend hearings on the Plan, and there was no finding that the expenses were unnecessary or unreasonable.

5. The proposed findings and conclusions were supported by the undenied proof and settled principles of law, and it was the duty of the District Court to adopt them. The Court of Appeals erred in affirming its order and in substituting assumptions for substantial evidence which was lacking.

6. The assumption that the Commission knew who performed the services resulting in benefit to the estate, when it determined that petitioners were entitled to "nothing" as a "maximum" fee, which constituted the "substantial evidence" in support of its report, existed when the Court of Appeals reversed the previous order and directed the court to examine the evidence, and to ascertain from such evidence whether there was substantial evidence to support the report. There was no need to reverse the order with the directions if the court could base its order on extrinsic assumptions without regard to the evidence. The Court of Appeals, therefore, erred when it affirmed the order below.

ARGUMENT.**I.**

The Commission's Report Lacked Basic Findings and It Was the Duty of the District Court to Reject Its Report and to Make Essential Findings Under Rule 52 (a). Its Mere Statement That the Report Was Sustained By Substantial Evidence Was Insufficient and It Was the Duty of the Court of Appeals to Reverse Its Order and Either to Adopt the Proposed Findings Or to Direct the District Court to Make the Proper Findings.

(a) A report of a Commission which lacks essential findings must be rejected.

A report of a Commission which is possessed of quasi-judicial functions must contain *basic findings* so that on review the court may determine whether the findings are supported by substantial evidence. This Court said in *Beaumont, S. L. & W. R. Co. v. United States*, 282 U. S. 74:

"Complete statements of the commission showing the grounds upon which its determination rests are requisite or necessary as are opinions of law courts setting forth the reasons on which they based their decisions in cases analogous to this."

Findings of the Interstate Commerce Commission *must embrace basic facts* needed to sustain its orders (*Morgan v. U. S.*, 298 U. S., 468). A report of a Commission which lacks basic findings cannot be sustained (*United States v. B. & O.*, 293 U. S., 454; *Phelps Dodge Corporation v. National Labor Board*, 313 U. S., 177).

In *Saginaw Broadcasting Co. v. Federal Communications Commission*, 96 F. (2) 554, the Court said:

"The requirement that courts, and commissions acting in a *quasi-judicial* capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extra-legal considerations; and *findings of fact serve the additional purpose*, where provisions for review are made, *of apprising the parties and the reviewing tribunal of the factual basis* of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law or, on the contrary, upon arbitrary or extralegal considerations. *When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis*, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. *The requirement of findings is thus far from a technicality*. On the contrary, it is *to insure against Star Chamber methods*, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts." (Emphasis ours)

This applies on all fours to the so-called "Findings and Conclusions" of the Court (Tr. 27).

- (b) The report of the Commission lacked the basic facts, and it was the duty of the District Court to sustain the objections and to reject its report, and the Court of Appeals erred in affirming its order.

Petitioners were allowed to intervene before the Commission and before the District Court early in 1935 (Tr. 14). § 77 (e) 12 provides that,

"within such maximum limits as are fixed by the Commission, the judge may make allowance * * * for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties interest * * *".

Petitioners expended \$436.80 (R. 21). Schedule "B" contains an itemized statement of the expenses (R. 32), including \$7.30 for printing the petition for modification and \$4.50 for printing objections to its report, and the balance was for *traveling expenses from Chicago to Washington in connection with the hearings before the Commission*. Meyer Abrams was cross-examined extensively as to these expenses (Tr. pp. 22-24). In order to justify the "maximum limit" of "nothing" or "zero" for the \$436.80 expended, it was necessary for the Commission to make the *basic findings*: (1) that the expenses were not incurred, or (2) that the expenses were unnecessary, or (3) that they were unreasonable (*Great Northern R. R. Co. v. Sullivan*, 294 U. S. 458). The Commission found (R. 69) that petitioners "*performed services and incurred expenses from July 18, 1935*". It found that they became *parties by intervention* "before the Court and the Commission". It found that they filed exceptions to the report of the Examiner and filed a petition for modification of the Commission's Report. *Having made these findings, it was required to find that the \$436.80 was unnecessarily expended or unreasonable, or that it was not necessary for the petitioners as intervenors to attend the hearings.* In vain will one look for such a finding, as *there is none*. There was a finding, or rather a conclusion, that "the services rendered were of no benefit to the estate" (R. 70), but *there was no finding that it was unnecessary for the petitioners who were allowed to intervene to attend the hearing concerning*

the Plan, and that the \$436.80 was unnecessarily expended, or that it was unreasonable to expend such amount. Certainly one cannot make a "zero" or "nothing" under the guise of a "maximum limit" of \$436.80 expended when the Commission conceded that petitioners were parties to the record and attended the hearings.

The District Court found that there was "substantial evidence" to support the report (Tr. 27). This was a bare statement, or rather a conclusion. *We challenge the respondents to point to anything in the record tending to support such statement.*

The opinion of the Court of Appeals endeavored to find some reason for the "maximum limit" of "nothing" concerning the compensation, but *not one word will there be found in its opinion tending to support the report which fixed a "maximum limit" of "nothing" as to the "\$436.80" expended.* This point was squarely raised by the fourth objection to the report (R. 104). It was raised at the hearing before the Court, and "proposed findings" (10 and 11) related to such issue (Tr. 32), which the District Court refused to adopt. It was the duty of the Court of Appeals to reverse its order and either to make findings of its own or to direct the court below to make the essential findings.

II.

The Proposed Findings Were Supported By the Undenied Proof and It Was the Duty of the Court to Adopt the Findings Which Would Have Resulted in the Opposite Conclusion Calling for Rejection of the Report.

We will take up the "proposed findings" and demonstrate by the record that each of the findings was supported by the undenied proof.

(a) It was the duty of the Court to adopt the proposed findings which would have led to the irresistible conclusion that the report should be rejected.

It was the duty of the District Court to adopt the findings which would have resulted in the irresistible conclusion calling for rejection of the Commission's report, and the Court of Appeals clearly erred in approving its order.

The 1935 Plan: The first "proposed finding" (Tr. 29) related to the 1935 "stand-by" plan of the Debtor. This plan provided for a change in one-third of the "fixed" interest on the General Mortgage bonds to "contingent" interest, which was "cumulative" and matured in ten years. A similar change was proposed as to the fixed interest of the Fifty Year Mortgage bonds as to the entire interest. There was also a provision for a "voting trust" and the personnel was chosen in advance by the proponents of the plan. The accuracy of this "proposed finding" is shown by the Report of the Commission (Vol. V, pp. 2182-2185).

This finding was necessary in connection with the claim for services in pointing out the objectionable features of the plan, which were subsequently cured by the 1938 plan, which was more fully described in the petition (R. 20) and in the testimony in support of the petition (Tr. 26). This finding was, therefore, improperly rejected.

The Services: The second "proposed finding" (Tr. 29) related to the allowance of the intervention by the Court as well as by the Commission and concerning the hearings held before the Commission with reference to the 1935 plan, which hearings were held at Washington on August 5, 6, 7 and 8, 1935. The accuracy of this finding is *beyond dispute* for even the Com-

mission stated in its report (R. 69) that petitioner "intervened in the proceeding before the Court and the Commission" and participated in the hearing before the Commission on the plan of reorganization. Their appearance and active participation at these hearings appears in Volumes I and II (pp. 249-1052).

In view of the finding of the Commission (R. 69) that petitioners "performed services and incurred expenses from July 18, 1935" amounting to \$436.80 which included trips to Washington concerning these hearings (R. 32), the "proposed finding" was important as bearing on the issue whether the "maximum limit" of "nothing" for the expenses was supported by "substantial evidence" as stated by the Court (Tr. 27). It is obvious that if the Court had found that petitioners were allowed to intervene and attended the hearings at Washington, D. C., before the Commission in opposition to the 1935 plan, that its conclusion that the "maximum limit" was "nothing", could not be sustained. The limit of "nothing" or "zero" could not have supplied the transportation expenses for Railroad fare from Chicago to Washington. It was the duty of the Court to adopt the proposed finding and set forth that petitioners obtained leave to intervene in the District Court and before the Commission and necessarily incurred traveling expenses from Chicago to Washington in attending the hearings from August 5th to August 8th, 1935. Such a finding would be inconsistent with the "conclusion" that the "maximum limit" for such expenses was "nothing".

**Benefit to the
Estate**

The third "proposed finding" (Tr. 30) related to the activities of the petitioners at hearings concerning the 1935 plan in August, 1935, showing that they brought out

by their evidence and argument that the plan was unfair and not feasible, *due to the cumulative features for the payment of the contingent interest at the end of the ten year period.* This finding had a direct bearing on the question whether the statement of petitioners that their services contributed to the defeat of the 1935 plan was true (R. 20), or whether the Commission's report that the statement is not borne out by the evidence, was justified. The Commission stated in its report (R. 69): "They state (petitioners) that their efforts were primarily responsible for the abandonment of the first plan, and the abandonment of the proposal for a voting trust. We are not persuaded that the evidence supports such a statement". If the Court had given the requested finding, it would have been compelled to say that the claim of the petitioners *was supported by the evidence, contrary to what the Commission said.* We will, therefore, demonstrate that the "proposed" finding is *supported* by the evidence.

The proposed finding was to the effect (Tr. 30) that the Debtor and Institutional Groups sponsored the 1935 plan and the *only* group which *opposed* them was the Group represented by the petitioners, who actively participated in the hearing in the examination of witnesses, in the production of evidence and in argument. The Court was asked to find that petitioners urged (Tr. 30):

- (a) that the plan, which did not change the capital structure and only changed the interest from "fixed" to "contingent" was unfair and unreasonable as the debtor would have emerged from the reorganization with a shortage of a million and a half for "fixed" interest charges;
- (b) In the event of a default in the "cumulative" interest on the General Mortgage, the 50-year mortgage bond issue would have been wiped out on foreclosure;

- (c) In the event of a similar default on the cumulative interest on the 50-year Mortgage bonds all of the capital stock (given in exchange for the Adjustment Bonds), would have been wiped out.
- (d) The "voting trust" was unfair in that no representation was given to the Adjustment Mortgage bondholders who were given stock without a voice in the management.

Volumes I and II contain the proceedings before the Commission concerning said plan, and such record speaks for itself. The hearings were commenced August 5, 1935 (Vol. I 249): Mr. W. K. Sparrow was the first witness and was examined on direct by Mr. Swaine, counsel for the Debtor. His direct testimony (pp. 271-366) *tended to show the fairness and feasibility of the plan*; 96 exhibits were introduced in evidence in support of the plan. He was cross-examined by Mr. Abrams (pp. 401-420).

The cross-examination brought out the facts that the "net" income under the plan (based on the average income for the years 1932, 1933, 1934) *would be \$1,500,000.00 short to cover the "fixed" charges*; that the railroad *would have emerged from the reorganization with an immediate deficit of \$1,500,000.00 on the "fixed" charges* (p. 403). Mr. Abrams showed that *the entire plan was unfair and unfeasible* because it left the *divisional mortgages undisturbed*, and the change from the "fixed" interest on the General Mortgage to "contingent" interest as to *one-third* thereof, and from the "fixed" interest on the 50-year Mortgage to "contingent" interest, was fraught with danger because the interest was "*cumulative*" and became "*fixed*" in ten years. In the event of a default in the General Mortgage interest payment, the 50-year Mortgage bonds, as well as the Adjustment Mort-

gage bonds (who were to be given stock in lieu of the bonds) *would be completely wiped out*. In the event of a default in the 50-year Mortgage bonds, the Adjustment Mortgage Bonds (exchanged for stock under the plan) would likewise be wiped out.

In answer to his question whether in view of the fact that a default was *imminent*, the *cumulative* features under the Fifty-Year Mortgage might result in wiping out the stock allotted to the Adjustment Mortgage bondholders, the following answer was given (Vol. I, p. 405):

"The plan provides that if ten years' interest accumulates on those bonds, they can do that. If the adjustment bondholders which get the new preferred stock and the present preferred and common stock which get the new common stock, did not feel at the time that that condition should arise, that it was worth their while to assess themselves one-half year's interest, so as to prevent the full ten years accumulating, *then the 50-year bonds could come in and foreclose, and, as you say, wipe it out*, assuming that the courts confirmed and approved."

The further question was asked:

"Under the present earnings, would there be sufficient money to pay interest during the next ten years under the 50-year mortgage?"

The answer was:

"No, sir, there won't be on the present level of earnings this year, if that is what you mean."

Q. I mean on earnings of the past three or four years.

A. No, sir, there would not be.

Q. So that it is a foregone conclusion, if the road had an income similar to the past three or four years, *the 50-year bonds can wipe out all the stock and all the adjustment mortgage bonds?*"

The answer was "yes".

The question was asked (Vol. 1, p. 415) whether a default in the cumulative interest on the General Mortgage bonds would not wipe out the 50-year Mortgage, which was a junior lien, and the answer was:

"If we can conceive that the earnings of the company run for ten years so that the one-third interest of the general mortgage is not paid, I suppose that also is correct."

It is demonstrated from the foregoing that the *unfairness of the plan and its dangerous features were brought out and contested by these intervenors and their counsel, (the petitioners), and by no one else.* No one else called it to the attention of the Commission at the hearings on August 5, 6, 7 and 8, 1935, and all other groups sponsored this plan and urged its adoption (Tr. 15, 26).

This *inequitable plan* had the *approval* of the Debtor and the Institutional Groups and Mutual Savings Banks. The Debtor's witness admitted on the cross-examination (p. 406) that prior to the submission of the plan, it was submitted to the "representatives of Insurance Groups and Savings banks". He stated (Vol. 1, p. 409) that the "plan was a growth; it was not one produced and sponsored but was a gradual development of discussions, not only among ourselves and our Board, but the large owners, who were met with, from eighteen or nineteen groups."

Mr. Scandrett, one of the Trustees, and the president of the Railroad, testified that the 1935 plan had the approval of a special committee (p. 462); that (p. 510) "a great deal of thought and time and attention were devoted to the preparation of that position" and they "were very greatly aided by advice of counsel, of Chairman Jones of the Reconstruction Finance Corporation,

and by the services of insurance companies, trust companies, and savings banks which own over \$100,000,000.00 worth of our securities"; that (p. 511) "*The plan is the best plan*" that *they* "could devise with the limitations that have confronted" them.

Mr. Burgess, counsel for the Institutional Groups, *then supported the plan* and gave his reasons in support of the plan (pp. 536, 537).

From the foregoing reference to the record it is conclusively demonstrated that the third "proposed finding" was true. The finding was necessary to the most vital issue in the case, namely, *whether or not the services rendered were of any benefit to the estate*. The failure to give the requested finding was clearly erroneous, as such a finding would not have justified the Court's conclusion.

The fourth proposed finding (Tr. 30) was that at the close of the hearing concerning the Debtor's plan, *its adoption was urged by all other groups*, notwithstanding the objectionable features as pointed out by petitioners. The correctness of this finding is not open to dispute. The testimony of Mr. Abrams (Tr. 15) that the 1935 plan was agreed in advance by the Debtor, the "Institutional Groups" and the other Bankers who even agreed on the persons who were to be the "Voting Trustees", stands undenied. It is supported by the record (Vol. 1, pp. 413-414).

The fifth proposed finding (Tr. 30), that on June 16, 1937, the Debtor changed its position (on the ground previously urged by Mr. Abrams) *that the cumulative features were objectionable* and that the other groups *still urged the adoption of the plan*, is also sustained by the record. At the close of the evidence in August 1935, it

ended with the recommendation of counsel for the Debtor and for the Institutional groups that the plan *was then fair and equitable* (Vol. I, pp. 250-254). At the hearing held on June 16, 1937, before the Commission, which was not attended by the petitioners (Vol. II, p. 547), Mr. Furman R. Dick appeared as a witness and testified that he was a director and a member of the committee which previously recommended the 1935 plan. In urging now the *inadvisability* of the adoption of the plan, he testified (p. 600):

"If it is determined that contingent interest bonds should be provided as part of the new financing media, then *the provisions of the 1935 plan with respect to contingent interest on the 50-year 5% mortgage bonds present a difficulty even more acute than was presented by the 1935 plan itself. Cumulative provisions, unqualified, and unlimited, may result in distortion of railroad capital structures.*"

He further testified:

"Even if the 50-year mortgage bonds are to be given full cumulative contingent interest, it seems to me that *further study must be given to the provisions of the 1935 plan, that a ten year accumulation of interest would constitute a default.*"

It is evident from the foregoing that the evidence adduced by the petitioners that the cumulative features were unfair and that the debtor would emerge from the reorganization under the 1935 plan a cripplie made an impression and brought a change of heart.

The Institutional Groups did not even concede thereafter that the plan was unfair because of the cumulative feature. At a subsequent hearing Mr. Burgess, on behalf of the Institutional Groups, stated (p. 630):

"While, of course, the contention previously adopted, at our consent, has not been met, that is, the

plan has not promptly been adopted, nevertheless its provisions in the main have been complied with under appropriate orders of the Court. We are, therefore, still willing to acquiesce in the plan as a vehicle of prompt reorganization at this time."

He further stated:

"We are not agreeable to changes in this plan which will affect the priorities of the mortgage liens as to either principal or interest * * *. We do not understand that those representing the debtor propose any such modification, and that the plan as previously proposed is not withdrawn or modified. With this understanding we interpose no objection to the suggested adjournment."

This proposed finding tending to support the statement in the petition on which the claim for fees was based was therefore clearly improperly refused.

The sixth "proposed finding" (Tr. 30-31) was that at the hearing of September 20, 1937, the Debtor and the Institutional groups sought an *indefinite delay*, which was opposed by the petitioners and who urged that the Commission should formulate a plan of its own and whose position was sustained when the Commission denied the postponement and directed the preparation of briefs, is also supported by the undenied proof.

The hearing commencing September 20, 1937, was attended by Mr. Abrams (p. 636). At such hearing Mr. Scandrett the president of the road and one of the Trustees testified on direct examination by Mr. Swaine, calling attention to a resolution of the Board of Directors to the effect that no plan of reorganization should be adopted at this time, and he stated that negotiations were on between the Debtor and Mr. Walker, as the chairman of the committee for the Industrial Groups, concerning modi-

fications of the plan, but that an agreement had not yet been reached, and he asked for an *indefinite* postponement. The witness was cross-examined by Mr. Abrams (p. 644). He *conceded* that he had previously testified that the plan was fair, but claimed that he did not say that it was feasible. The witness was then asked (p. 647):

"I am asking whether you now admit that the plan that was proposed by the debtor is not feasible."

He answered:

"No, I do not admit that. It is conceivable that this plan well might work out * * *. There are no evils in the present plan, as far as we are advised."

Furman R. Dick then testified, on direct examination, (R. 651) urging the indefinite postponement of the hearings, and was cross-examined by Mr. Abrams (p. 660). He *conceded* that he had previously approved the 1935 plan and that if the various divisional mortgages could be eliminated under a system plan whereby preferred and common stock could be issued in lieu of the complicated structure, it would be beneficial, and that in some instances such plans were accomplished.* At the conclusion of this hearing, Mr. Abrams stated (p. 667):

"I would like to urge upon the Commission *not to give the continuance unconditionally*. This property has been in reorganization constantly * * *. It is not the object of §77 to come into a court * * * and to repeat the evils of the equity receiverships by throwing the company into receivership and to prevent creditors from taking their legal steps. The effects of this reorganization and the granting of continuance without anything definite is to stop creditors from pursuing their legal remedies."

He further stated:

"Your Honors will recall that in 1935, when I appeared and examined some of the witnesses, their

* The plan as finally adopted created a system mortgage instead of the divisional mortgages and issued new preferred and common stock.

testimony was altogether different from their statements today. The record is here. They now admit what I contended in 1935, that the other plan, if carried out, after its completion would predicate another reorganization immediately thereafter. They now admit that it cannot go through under the plan."

He further stated that he was opposed to plans presented by committees which are ostensibly organized to protect the public, but are really interested in protecting persons who have a conflicting interest. Mr. Abrams said:

"It is about time that the public itself should have a representative to work out a reorganization, and my suggestion is that this Commission ought to appoint a board of reorganizers, one, two or three persons, and let them cooperate with committees, but let this board between now and the next time that the hearing will be adjourned, try to work out a plan which will be fair and equitable to the investors."

He further urged that a continuance be granted upon the condition for the appointment by the Commission of a board of reorganizers who will present to the next hearing a modified plan of reorganization (p. 668).

Division 4 then sustained him and denied the motion to continue the hearings indefinitely, Commissioner Porter saying:

"The Division gave, I think, very careful consideration to all of the grounds that were urged in that petition at that time. Now all of us up here are agreed that nothing has occurred here this morning that changes that picture from what it was when the Division considered the matter the other day, and that being true I have nothing else to do but to declare this record and this hearing closed."

Mr. Burgess then said that he would like to appeal from the decision closing the proof, and introduced Mr. Walker

as a witness in support of his petition for appeal. Mr. Walker testified, on direct (p. 674), and Mr. Abrams objected, saying:

"I want to object to this evidence which is incompetent, irrelevant, and immaterial to the issue now."

Commissioner Porter said:

"I just asked Mr. Burgess about that. I do not see what it is relevant to on the question of petition for rehearing, whether or not Division 4 shall be overruled, or sustained."

When the Commissioner sustained the objection, Mr. Burgess stated that he desired to make an offer of proof (p. 679). When this was objected to by Mr. Abrams, Commissioner Porter said that he thought the offer of proof was proper (p. 680). Mr. Burgess then introduced a letter that Mr. Swaine wrote on behalf of the debtor, to Mr. Walker, the chairman of the institutional groups, dated September 9, 1937, which letter referred to the application to postpone the hearings on the 1935 plan, and the letter stated that the postponement was asked because consideration must be given to "*changing the fully cumulative feature of 50-year bonds* to provide for accumulation of interest on the bonds against income for only some limited agreed period." In the colloquy that took place between the Commission and the attorneys, Mr. Swaine stated (p. 687):

"The debtor does not admit that the 1935 plan is not a feasible plan. The debtor does not withdraw the 1935 plan."

He then referred to one of the modifications that was suggested and said (p. 687):

"The said modification is—and the chairman was fairly specific in the letter to Mr. Walker on that—that a full cumulative provision with respect to the 50-year fives should be eliminated and the bonds ac-

cumulated against income only for a limited time. *With these two modifications the debtor believes the plan is fair, equitable and feasible, even in the light of today's circumstances.*"

At the conclusion of this hearing, after the offer of proof was made, Commissioner Porter asked for how long a time the parties desired to file briefs. Mr. Abrams suggested that thirty days would be sufficient, and the Commissioner finally fixed sixty days (p. 691) for the filing of briefs. Mr. Abrams then asked:

"Will Your Honor, in the brief, expect recommendations and suggestions as to modifications of the plan?"

To which, Commissioner Porter replied:

"Yes, that is what I understand they are for, among other things. Of course, every suggestion must be based upon facts developed here of record."

The hearing was then adjourned.

The testimony of Mr. Abrams shows (Tr. 16) that he stayed in Washington for several days, worked on the record and Brief, but when he returned to Chicago he discovered that the Commission had changed its mind and reopened the case. This is substantiated by the *ex parte* order of September 24, 1937 (p. 692), when the hearing was reopened and set for February 1, 1938. Were all of these services worth "nothing" as a "maximum"? The answer "no" is irresistible.

Had the District Court given this proposed finding, which is substantiated by the record, the court could not have reached the conclusion that the services were worth "zero".

The seventh "proposed finding" (Tr. 31) related to the *ex parte* order granting the postponement and to the

filings of a plan by the Institutional groups on January 10, 1938, and an amended plan dated January 24, 1938, both of which eliminated the objectionable features in the 1935 plan. This finding was material on the issue whether or not the services of the appellants were beneficial to the estate. The accuracy of the finding is beyond dispute.

At the hearing held February 1, 1938, Mr. Walker, chairman of the Institutional Groups, testified that the Group prepared a new plan instead of the debtor's plan for a sound capital structure, and while he was testifying Mr. Abrams interposed the objection (p. 725):

"It appears that the witness is reading from a document filed as an exhibit, and there is no use of taking up the time of the Commission or of the lawyers here in reading it. If he has anything to add that is not in this exhibit, I think the witness should do it, but he should not be permitted to read this document."

Director Sweet sustained the objection saying:

"There will be no necessity of reading anything that is in the exhibit."

The witness then stated (p. 726) that his committee, after a careful study of the debtor's plan, has concluded that it was not desirable to amend the debtor's plan, *but to file a new plan*, and stated the conclusions of the committee. Another objection was then interposed by Mr. Abrams (p. 727):

"The witness has the right to testify and bring out the facts; conclusions are for this Commission, and I, therefore, ask that every statement of belief or conclusion not predicated upon evidence be stricken from the record."

Director Sweet:

"The objection will be noted and overruled for the purposes of the hearing."

In answer to a question by Mr. Burgess as to what consideration the witness gave in determining the capital structure under the new plan, the witness answered (p. 739), that among such considerations was *that the annual charges on the contingent interest debt should be covered by the probable future normal earnings* and that the funded debt should not constitute an excessively large percentage of the capitalization after the reorganization.

This demonstrates that the points urged by the petitioners at the previous hearings as to the unsoundness of the debtor's plan were given some consideration in preparing the new plan, and that they finally penetrated into the "hearts" of the Institutional Groups.

The direct testimony of Mr. Walker consumed 79 pages (pp. 717-796). He was cross-examined by Mr. Abrams (pp. 809 to 829). The cross-examination showed that the debtor had some *free assets including a \$10,000,000.00 cash fund* (pp. 812, 813); that under the proposed plan the Adjustment Mortgage Bondholders were not to participate in the *free assets*, although their claim against such assets was on a *parity* with the senior creditors (p. 819).

Attention was directed to the fact that the Institutional Groups had previously sponsored a plan which called for interest at 4½% on Series B and that the new plan called for interest at 5% (pp. 821, 822). *The final plan, which the Commission approved, allowed only 4½% on Series B, and disapproved the committee's plan of 5%.*

Mr. Abrams' cross-examination of the witness Sparrow brought out the fact that the debtor and the Institutional Groups *had agreed in advance on the voting trust and on the names of the voting trustees*. It was also shown that (p. 413) the Institutional Groups had mostly in-

vested their funds in the *senior* securities and, therefore, their interest was primarily in the *senior securities*, and not in the Junior Adjustment Mortgage Bonds. Mr. Abrams asked the witness:

Q. "They are going to name the voting trustees on behalf of the adjustment bonds?"

A. "They are naming the voting trustees on behalf of all the securities just as much as on the fives of 1975 as on the adjustment bonds."

He further asked:

"Do you not think there is a conflict of interest here when a person is named as trustee by a superior class to represent a fiduciary of an inferior class?"

The answer was:

"The superior class, as you call it, is making this sacrifice, and during that period they ask for a voting trust to protect their interest."

Q. "So who will protect the beneficiaries?"

A. "The Board of Directors."

Q. "Who will elect them?"

A. "The voting trustees."

A further question was asked (p. 414):

"Does this equitable and fair plan provide in fact for the representation of adjustment bonds?"

A. "They give their voting rights to the voting trustees."

Q. "You understand by that, that the voting trustees will vote in favor of superior interests?"

A. "I think they will elect directors who will properly manage the property to the interest of all security holders."

This bears out the testimony of Mr. Abrams concerning his opposition to the voting trust in the form as it was proposed (Tr. 17).

The voting trust was recommended by the examiner, and petitioners filed specific objections thereto (R. 17-18). The Commission, in its first report, held that no trust

was necessary. However, in its modified report, it recommended a voting trust, but in recommending the voting trust *it gave representation to the adjustment mortgage bondholders* who were allowed to name one of the five voting trustees. Of course the subsequent report of the Commission filed after May 1, 1940, cannot be considered.*

The ninth "proposed" finding (Tr. 31) related to the above report of the Examiner which recommended a voting trust and to which report the appellants filed objections, and the fact that the Commission eliminated the voting trust from its plan dated February 12, 1940. It also related to the fact that petitioners objected to the 5% on Series B and urged 4½%, which was adopted by the Commission. It also related to the allowance of 39,000 shares to the Adjustment Mortgage Bondholders for their "free assets", which was urged by petitioners (R. 17). The objections to the Commissioner's report speak for themselves. The fact that petitioners opposed the Voting Trust appears in the printed record (pp. 413-414). The fact that they pointed out that the interest on Series B of 5% was excessive also appears in the record (pp. 821-822). The point that petitioners urged additional compensation to the "Adjustment" for the "free assets" also appears in the record (R. 17). *If the Court had given these findings, it could not have reached the conclusion that the report is sustained by "substantial" evidence.*

The tenth "proposed finding" (Tr. 32) related to petitioners' expenses in travelling from Chicago to Washington and their stay in Washington during the hearing, aggregating \$436.80. If the Court had found that appellants attended the hearings and travelled from Chicago

* Under the order of the court the claims for fees were limited to the services rendered up to May 1, 1940 (R. 10).

to Washington, the "maximum limit" of "nothing" or "zero" could not cover such expenses. These expenses were not even in dispute.

The eleventh "proposed finding" (Tr. 32) was that no objections were filed to the petition, and there was no dispute that \$436.80 was expended. There is no contention that anyone filed any objections. While the lack of objections in itself is insufficient ground for the allowance of fees and expenses, it has a bearing on the issue and appellants were entitled to the finding upon which the Court could thereafter base a proper conclusion.*

While it was not necessary for the petitioners to request the Court to adopt the "proposed findings" it was done in order to aid the Court, and it was the duty of this Court to adopt them or to make other findings on the essential issues in the case (*Hill v. Ohio Casualty Co.*, 104 F. (2) 695). A Court is required to make findings on every material issue in the case (26 R.C.L. Section 97). A request for finding is improperly denied where it relates to matter as to which the evidence is uncontradicted (*Right Printing Co. v. Stevens*, 107 Vt. 359). In the absence of specific findings by the Commission and the Court a reversal must follow (*Securities Commission v. Chenergy Corp.*, 318 U. S. 80).

(b) The Court of Appeals was unable to find the substantial evidence to support the report.

In attempting to justify the conclusion of the District Court that there was "substantial evidence" to support the report, the opinion states (Tr. 58):

* In view of the fact that these findings are supported by the undenied proof, the statement in the opinion (Tr. 60): "Nor is it for us to examine the evidence to determine whether we would have entered the same finding", is clearly erroneous.

"The proceeding was pending before the Commission for an extended period of time, and that body was in position to observe the actions of respective counsel and to judge of the value of the services rendered by them. It knew far better than any other agency who had contributed to the solution of the perplexing problems encountered in the evolution and promulgation of a workable Plan for the successful reorganization of a sadly involved debtor."

This theory is the *basis* for the alleged "substantial evidence" and is reiterated in the opinion (Tr. 59) where the court said:

"From all the facts it is apparent that the Commission knew full well, from the record, the nature of the services rendered by each of counsel who had contributed anything of value to the estate."*

These two statements were based on *misconceptions*. The fundamental misconception of the court is that it was led to believe that the services were performed before the Commission, which is not a fact. Some of the services were performed before the District Court, other services were performed before the Examiner, and the major part of the services were performed before *one* of the Divisions of the Commission (Division 4). The Commission as a *whole* was not acquainted with the services, which were performed before the other bodies. The evidence as to services rendered was taken by an Examiner and the Commission could only have formed an opinion and arrived at its deductions from the record. Due to the fact that the evidence was not disputed, there is no presumption in favor of the conclusions of the Commission. (*Kucoga Land Co. v. Kentucky River Coal Co.*,

* These assumptions existed when the Court of Appeals reversed the previous order and directed it to review the evidence to see if the report was sustained by substantial evidence. It did not direct it to look for assumptions which do not appear in the record and the court did not state that it approved the report on such assumptions.

110 F. (2) 894, 896; *Carter Oil Co. v. McQuigg*, 112 F. (2) 275, 279.)

The second fundamental misconception is that the Court of Appeals was led to believe that the objections to the 1935 Plan were eliminated by the Plan of the Commission, and that therefore the Commission knew "who" contributed to the elimination of objectionable features of the Plan. This is not true.

The opinion states (Tr. 59):

"It is said that appellants rendered valuable services in objecting to cumulative interest upon certain Bonds proposed to be issued."

In disposing of this point the opinion says:

"The record discloses elaborate studies of the earnings over a period of years and the comparative effect of cumulative interest with reference thereto, presented by other interests,"

and then it concluded with the statement:

"From all the facts it is apparent that the Commission knew full well from the record, the nature of the services rendered by each of the counsel who had contributed anything of value to the estate."

If the objections to the "*cumulative interest*" were removed by any plan which the Commission conceived, then the statement of the Court might be correct, because in eliminating the objectionable features the Commission would have known at whose instance it removed the objectionable features and who contributed to the result. But *the unfairness of the Plan as to the cumulative interest was not removed by any suggestion of the Commission*, but, as stated by the court, "*as a result of*" "*elaborate studies*" over "*a period of years*," and of the "*effect of cumulative interest with reference thereto*." *There is no evidence in the record showing the basis for*

these studies and upon what record they were founded. There is no testimony in the record that the change of heart on the part of the Debtor, two years later, and on the part of the Institutional Groups, approximately three years later, was brought about from studies which excluded the record made by the petitioners before the Commission. How could the Commission have known, *without evidence in the record*, "who" achieved the results in bringing about the elimination of the cumulative interest features by the Debtor and the Institutional Groups? It was not a mind-reader, and the "supposition" that the Commission knew everything, without even a *scintilla of evidence* to support it, does not come within the test of "substantial evidence" as required to sustain its Report (*Labor Board v. Columbian Company*, 306 U. S. 292).

The Court emphasized the point that petitioners were not present at the hearing in June, 1937, when the Debtor conceded that the "cumulative features" of the Plan made it unworkable or *unfeasible*. The point that the Plan was not feasible because of *cumulative* interest features was *first* urged by petitioners and was founded on the *studies which they made* and they brought these matters to the attention of the Commission and the parties.

The opinion states that it took "elaborate studies over a period of years." **What is there in this record to show that these studies were not based on the record which was made by the petitioners before the Commission?** True, it took the Debtor over a period of "years" to reach the conclusion which petitioners have reached at the hearings held before the Commission in August, 1935, and it took the "Institutional Groups" a longer period. This should not have reduced the compensation of the petitioners to "nothing" or "zero".

Petitioners have demonstrated from their studies of the earnings and by the cross-examination which they elicited from the witnesses that the *cumulative features were dangerous*, and because of such features the Plan was *inherently unfair*, inequitable, and fraught with danger. The Commission reached the conclusion that *such services were worth "nothing"*, and the District Court approved the report on the theory that there was "*substantial evidence*" to support it, when there is *not even a scintilla* of evidence to support such a report.

The theory advanced in the opinion that the "*substantial evidence*" consisted of the *supposed knowledge* of the Commission and that it "*knew everything that transpired before it*", *is a dangerous doctrine to announce*. Under such a doctrine *no finding of a Commission or Administrative Body may be disturbed, as it may always be said that there is substantial evidence because the administrative body knew what transpired before it*. Such has never been the *test* in passing on the question whether a report of an administrative body is sustained by "*substantial evidence*". This is *contrary* to the decisions of this Court, and to the decisions of other Circuit Courts.

In *National Labor Relations Board v. Union Pacific*, 99 F. (2d) 153, the question whether the report of the National Labor Relations Board was supported by "*substantial evidence*" was presented. There, the court could have sustained the report on the same theory that the National Labor Relations Board knew everything that transpired before it, and in reaching a *different* conclusion the Court said:

"We are bound by the Board's findings of fact as to matters within its jurisdiction, *where the findings are supported by substantial evidence; but we are*

not bound by findings which are not so supported, 29 U. S. C. A., § 160 (e) (f); *Washington, Virginia & Maryland Coach Company v. National Labor Relations Board*, 301 U. S. 142, 57 S. Ct. 649, 650, 81 L. Ed. 695 * * * Substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. Cf. *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 339-43, 53 S. Ct. 391, 393, 394, 77 L. Ed. 819." *Appalachian Electric Company v. National Labor Relations Board*, 4 Cir. 93 F. (2d) 989." (Italics supplied.)

In determining the meaning of "substantial evidence" the court said:

"Substantial evidence means more than a mere *scintilla*. It is of substantial and relevant consequence and excludes vague, uncertain or irrelevant matter. It implies a *quality of proof* which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom, and, considering them in their entirety and relation to each other, arrives at a fixed conviction." (Italics supplied.)

It further said:

"The rule of substantial evidence is one of fundamental importance and is on the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth, and unless all of it is weighed to its totality, errors will result and great injustice will be wrought. *National Labor Relations Board v. Thompson Products, Inc.*, 6 Cir. 97 F. (2d) 13, 15."

The Seventh Circuit reached the same conclusion in *National Labor Relations Board v. Boss Mfg. Co.*, 107 F. (2d) 578, where it said that "substantial evidence" is such as "will convince reasonable men and on which men may not reasonably differ" as to whether it supports the report of an administrative body. It must be sufficient to justify a refusal to direct a verdict in the case on trial before a jury "when the conclusion sought to be drawn is one of fact" (*Hazel v. Atlas Glove Co.*; *National Labor Relations Board*, 127 F. (2d) 109, 117). Substantial evidence must be more than to "create vagueness", uncertainty or suspicion of the existence of the essential facts (*Continental Oil Company v. National Labor Relations Board*, 113 F. (2d) 473, 481; *Indianapolis Power & Light Co. v. National Labor Relations Board*, 122 F. (2d) 757 (C. C. A. 7).)

All of these decisions, including the above decisions of the Seventh Circuit, are *contrary to the test applied in this case*, and may not be reconciled with the views expressed in this opinion tending to supply the "substantial evidence" which is wholly lacking and which, as a matter of law, the court should have so held were it not misled by the statements of our adversaries.

The Court said in its opinion (Tr. p. 58):

"Speaking more specifically, it appears that counsel for the debtor, for the Institutional Investors' Group and for other interests of the same category as those represented by appellants, actively participated. Whether it was their services or those of appellants which were of benefit to the estate was a question of fact peculiarly fit to be determined from the evidence."

We agree whole-heartedly with the statement of the Court, and ask—*Where is the "substantial evidence"*

showing *who* made the contribution? On this point the opinion is silent. It is *silent because there is no such evidence*, and it had to resort to the *assumption* that the Administrative Body *knew "who"* brought about the results. *This is not a substitute for "substantial evidence."* In dealing "specifically" with another point, the opinion says (Tr. p. 59):

"Appellants insist that they prevented inclusion of a Voting Trust, to the resulting benefit of new stockholders, but the ultimately approved Plan included such a Trust."

The order of the District Court directed the filing of the petitions on fees up to and including April 30, 1940. At the date of the performance of such services there was then pending the report of the Commission *which eliminated the Voting Trust*. The services, therefore, were to be determined *from the results accomplished at that stage of the proceedings*. The fact, that subsequently, the Commission changed its *mind should not have converted the valuable services producing such a result to a "zero."* Besides, the Voting Trust which was included in the ultimate Plan was *completely different* from the "Voting Trust" which was originally suggested. The Voting Trust that was originally suggested contained the names of persons who were selected by the various Groups *in advance of the filing of the petition for reorganization*. There was no representation given to the class of the Adjustment Bonds *while the Voting Trust which was included in the final Plan gave due representation to such class*. What is there in this record to show that this was not the result of Petitioners' efforts? Where is the "substantial evidence" to justify this finding? We cannot find it in the record. We cannot find it in the opinion of the Court, which undertook to deal "specifically" with the question.

The assertion in the opinion that the Institutional Groups and the Debtor represented the same class (Tr. 58) and therefore the objections to the inequitable features and the removal thereof may be attributed to them, is **not based on the record**. The record shows that the Debtor and the Institutional Groups **sponsored the 1935 Plan**. They **took the position that the cumulative interest features were not objectionable**. They could not have very well represented the same class in **sponsoring** the Plan and in **opposing** the Plan. The Court said in its opinion (Tr. 58):

"Nor is there anything in the record to indicate that they communicated with the debtor or its counsel or did anything to bring about the change of position."

When attorneys appear in open court and express their views it is just *as good a communication as when done in the dark.*

The testimony of Mr. Abrams before the Commission, which is *undenied*, showed (Tr. 15) that he developed by his cross-examination that the reorganization Plan was practically an agreed matter between the Debtor, the Institutional Group, and the Bankers, even prior to the filing of the petition under §77. They *had even agreed on the selection of the Voting Trustees*. All they wanted to get was "the stamp of approval of a court." He testified that with the exception of the Institutional Group there were no other parties who represented the class of the Adjustment Mortgage Bonds at these hearings. He stated that *he was the only one at these hearings who opposed the Plan which was then recommended by the Debtor and the Institutional Groups as to the cumulative features, the Voting Trust and other matters*, and (T. R. 16) "witness after witness" stated that the Plan was

"fair" and equitable. He testified that in September, 1937, the *same witnesses who had originally testified that the Plan was equitable, fair and feasible, were compelled to admit that the plan was unfair, inequitable and unfeasible.* He also testified that he (p. 17) opposed the "Voting Trust" when "everyone was in favor of it" including the Debtor and the Institutional Group, and his opposition to the Voting Trust was not merely because it was a Voting Trust but "*because the Voting Trustees were selected in advance by the parties who brought the proceedings and who worked out the Plan before the proceedings were even commenced in court.*" He also testified that the Voting Trust was eliminated from the original Plan, and while it was modified by the inclusion of the Voting Trust, it was *completely different* in that representation was given to this class.

The point (Tr. 58) that the services performed in obtaining the appointment of independent trustees was worth "nothing" because this was required by the amendment to the Bankruptcy Act, is without merit. This Amendment was equally applicable to similar services performed by Julius Weiss whose "maximum" compensation was fixed at \$1,500.00 and his expenses at \$826.00 (R. 78). The Commission stated that the services of Mr. Weiss were of no benefit to the estate with the possible exception of his services in connection with the appointment of the Trustees for the Debtor. The Commission, in fixing his maximum limits at \$1,500.00 for compensation and \$826.00 for expenses, *did not apply the reasoning that this was compulsory on the court, by reason of the requirements of the Act,* as it said (R. 67):

"Counsel's services were of little benefit to the estate except possibly in the matter of the appointment of Trustees."

If the argument advanced in the opinion (Tr. 58) that the appointment of Trustees followed from the amendment, and "nothing" was the "maximum limit" for such effort be sound, then why was a different scale of justice applied to the other attorney? Their own record that they produced, being an *excerpt* of what transpired in court, *and not the entire transcript* (Tr. 43) shows that petitioners *did* urge the appointment of independent Trustees. It was the court that pointed out (Tr. 44) that this was mandatory under the statute, and the court also pointed out that the amendment was made while Mr. Abrams was away in Europe; but this does not in anywise *detract from his efforts* in obtaining the appointment of independent Trustees, as shown by the evidence which is not even disputed.

We are not urging this point to deprive Mr. Weiss of his compensation, but only for the purpose of pointing out the *comparison and the discrimination*, which is always proper on the question of allowances (*Albert Dickinson v. Dickinson Industrial Site*, 104 F. (2d) 771, 776). If one attorney is entitled to \$1,500.00 for recommending independent Trustees, notwithstanding the mandatory provision of the statute, and to the \$826.00 for his expenses, there is no reason why the other attorneys, who urged this independent appointment, should be allowed "zero".

The Commission was in no position to say which of the attorneys was entitled to \$1,500.00, and which of the attorneys was entitled to "zero", as *the services were not performed before the Commission*, but before the Court, and what evidence, then, is there to support this "zero" limit? There is none. The "assumption" as to "better" knowledge of the Commission is evidently fallacious.

With this evidence *unchallenged, with no evidence to contradict it, and with the record bearing out such testi-*

mony, there is no basis for the opinion supporting the statement of the Judge that there is "substantial evidence to support the report."

III.

The Court Clearly Erred in Not Following the Proposed Propositions of Law.

Petitioners submitted to the Court propositions of law (Tr. 32-33) which it refused to follow. It clearly erred in that respect.

(a) It was the duty of the Court to hold that it was not the intent of Congress to deprive the courts of their functions and the jurisdiction of the Commission was confined to the fixing of a ceiling within which limits the Court may allow reasonable compensation.

The construction of §77(c) 12 relating to the allowance of compensation was presented to the District Court in the *New York N. H. R. Co.*, 46 Fed. Supp., 214. There, the court discussed the question whether the "maximum total limit" should arbitrarily be fixed and within such maximum the court should allow the compensation to the various parties, and in *rejecting* that idea it said (p. 219):

"Such an approach would necessarily be a resort to arbitrary and capricious action which well might stultify the Congressional intent that responsible creditor participation in the processes of reorganization should be encouraged by the allowance of reasonable compensation to the parties and their representatives for services reasonably essential to a just reorganization."

In another opinion rendered by the same Court in the same reorganization (46 Fed. Supp. 236), the Court said (p. 240):

"The power of a Judge so to return a petition must be recognized unless Congress intended that a Judge should certify an allowance as "reasonable" although convinced that it was inadequate. *Such a law would stultify both author and agent.* Moreover, the restriction of allowances to inadequate dimensions would tend to nullify the policy of the Act to encourage responsible creditor and class participation in reorganizations. This policy, in a sense, is paramount to the policy of economy in administration; were it otherwise the Act would have prohibited all allowance of compensation to the parties from the estate. *But plainly Congress did not want costless reorganizations rather than just reorganizations.* It follows that the true policy relating to economy is one adapted to preclude excessive expense—not to enforce inadequate compensation. Thus understood, the policy collides not at all with that of encouraging useful and responsible creditor representation by the allowance of adequate compensation through which that objective can be achieved."

The reasoning of the Court in construing the statutory intent is well applicable in the instant case. This court commented on this case in the *Bankers Trust case, supra*, but there is nothing there which is contrary to the reasoning in this case.

(b) "Maximum" and "Nothing" Are Not Synonymous.

The Commission was empowered to fix a maximum limit. It was not empowered to fix a minimum limit or "nothing" and in doing so it exceeded its jurisdiction.

In *Stevenson v. Flannery*, 117 P. (2) 717, the Court said (p. 720):

"Maximum means the greatest possible quantity, amount or degree. It implies the comparison of one thing with another of a lesser degree."

No such comparison exists between "maximum" and "nothing." If the Commission may fix "nothing" as to the petitioners, then the Commission could have fixed the maximum of "nothing" as to all the parties. This would be an absurdity, and would be in violation of the intent of Congress, as said in *re New York N. H. & H. R. Co., supra*, 46 Fed. Supp. 236, 240, that "plainly Congress did not want costless reorganization rather than just reorganization." If the Commission was empowered to fix a maximum limit of "nothing" and if it had fixed such "nothing" as to all the parties, then there really would have been a stalemate or deadlock between the Commission and the Courts. This deadlock was discussed in *re New York N. H. & H. R. Co., supra*, and at page 241 the Court said:

"To be sure, this seems a cumbersome procedure for the liquidation of an allowance. Indeed, *theoretically at least, the procedure may produce a deadlock between the Commission and the Judge which may ultimately block a reorganization And if ever a case shall arise resulting in a final deadlock instead of agreement, perhaps the disagreement can be solved by an appeal from the Judge's order approving the reasonableness of a reconsidered maximum set by the Commission.*"

The Commission was *not authorized to fix the lowest amount* but to fix "*the maximum limits*". The Commission fixed "zero" or "nothing" under the guise of "maximum" limits. The term "maximum" is defined (Webster's New International Dictionary, 1925 Ed. p. 1333) as follows:

"The greatest quantity or value attainable in a given case; or, the greatest value attained by a quantity which first increases and then begins to decrease; the highest point or degree;—opposed to *minimum*."

The term "nothing" is defined (p. 1472) as follows:

"Absence of all magnitude or quantity, however small, also a cipher; a zero; * * * that which is characterized by utter absence of determination."

This is synonymous with "zero" which is defined (p. 2369):

"A constant less than any assignable magnitude or quantity; nothing; the lowest point; nothingness; nullity."

In *Croghan v. Savings Trust Co.*, 85 S. W. (2) 239, (Missouri, 1935), the court asked (p. 242):

"What is nothing?"

It answered:

"Lexicographers usually define it as naught; that which is non-existent; a non-entity. Shakespeare defines it through the mouth of Bassanio, as follows: 'Gratiano speaks an infinite deal of nothing, more than any man in all Venice. His reasons are two grains of wheat hid in two bushels of chaff, you shall seek all day ere you find them, and when you have them, they are not worth the search.' Merchant of Venice, Act I, Scene 1."

The term "maximum" is defined by the Supreme Court of Illinois in *Moweaqua Coal Corp. v. Industrial Commission*, 360 Ill. 194, at page 200, as follows:

"There is, so far as we are advised, neither difference in nor shades of meaning given by lexicographers and the courts to the word 'maximum.' It is universally defined to mean the highest or greatest amount, quality, value or degree. Webster's New Int. Diet.; Century Diet. 1913 ed.; 6 Oxford Dict. 1908, p. 254; Funk & Wagnalls New Standard Dict.; *Trustees of Schools v. Berryman, supra*; *In re Hanaca, supra*; *Poolman v. Langdon, supra*."

The Commission therefore exceeded its jurisdiction and it was the duty of the District Court to reject its report.

In disposing of the point that the Commission was without jurisdiction to fix "nothing" under a limitation of power to fix a "maximum", the opinion states (Tr. 60) that "if nothing was earned, nothing could be allowed, and therefore the maximum was nothing". The Court confused the two functions (1) the function of the Commission to fix the maximum allowance, and (2) the function of the Court *to make the allowance* within the "maximum." When a Commission fixes "zero" as a "maximum", *it strips the court of the power to make any allowance*, and thereby deprives the Court of its function. The question as to "how much" compensation or expenses should be fixed, is a *factual* question, and this was for the Commission to decide. But the question if *anything* should be allowed was purely a "judicial question". In fixing the allowance of "nothing" the Commission *exceeded its jurisdiction* and *usurped* the function of the court.

The concurring opinion of Mr. Justice Douglas in the *Bankers Trust* case (318 U. S. 163), is *most persuasive* on this point. He did not *dissent* from the majority opinion but *concurred*. There is nothing in the majority opinion which is at variance with his views on this point. There, he said (p. 174):

"But the requirement in subsection (e) (2) that the judge find that the awards are 'reasonable' negatives the idea that the findings of the Commissioner are conclusive. Hence within the maximum limits of the total allowances for fees and expenses, the Judge can make readjustments — increasing or decreasing amounts awarded to the various claimants or granting allowances where none were made by the Commission. The contrary view was adopted in *In re Chicago, M., St. P. & P. R. R.*, *supra*, pp. 374-375.

The court felt that since subsection (e) (12) spoke of the 'maximum limits' and 'maximum allowances' fixed by the Commission, the findings of the Commission as to the maximum amount which each claimant could receive were conclusive. But that interpretation is difficult to reconcile with the requirement of subsection (e) (2) that the judge must find the allowances 'reasonable.' The use of the plural in subsection (e) (12) only indicates that the maximum allowance for fees and the maximum allowance for expenses are both to be fixed by the Commission." (Emphasis ours.)

The conception that the Commission might fix "nothing" as a "maximum" and deprive the courts of their function as now announced in this opinion is *diametrically opposed to the views expressed in the concurring opinion* on which the majority opinion did not disagree.

In *re Chicago North Western Railway Company*, 121 F. (2) 791, the Court discussed the effect of section 77(e) 12 on the point that the Bankruptcy Act provisions dealing with railroad reorganization *do not contemplate that a Federal District Court shall delegate* its judicial powers to the Interstate Commerce Commission and merely sign orders which the Commission advises or approves other orders which the Commission has made, but that it *contemplates an exercise of judicial functions*. This was specifically held in connection with the construction of §77 pertaining to the *maximum allowance*.

If the Commission be empowered to fix "nothing" as a maximum limit, then it must follow that it could have fixed "nothing" as to all the litigants. How could a court under such circumstances increase or decrease the "zero"? *It must follow that the Commission was without jurisdiction to fix "nothing" as the maximum limit*, and, therefore, its report must be rejected.

IV.

While Compensation May Not Be Allowed for Services Rendered By Intervenors Which Made No Contribution to the Proceedings or Plan, Yet the Compensation Does Not Hinge on the Success of Such Contributions.

Respondents contended below that compensation may be allowed only under §77 for services performed by intervenors in connection with the proceedings and plan which were successful, and that no compensation can be allowed when the intervenors were not successful. This whole discussion is *academic* for the reason that we have shown that the efforts were successful.

It is clear from the report that the Commission did not fix the maximum limit on the success of the efforts or contributions of the several intervenors, but considered the applications on the question whether the intervenors contributed to the proceedings and the plan in an attempt in good faith to represent their class and to obtain more favorable terms for them. *This is evident from the fact that the Commission allowed a maximum fee to the firm of Poppenhusen, Johnston, Thompson & Raymond, who represented the protective committee for the preferred stock.* Their services are set forth in the Commission's report (R. 65). They were allowed \$5,619.00 for their fees and \$1,802.00 for the services of one of their witnesses and \$1,875.00 and \$331.00 for the services of another witness (R. 744). *They were not successful in their efforts as the preferred stock was completely wiped out.* They urged the consolidation of the North Western with the Milwaukee Road. They were unsuccessful in that respect. *They were unsuccessful in any respect insofar as it referred to the preferred stock, yet the Commission fixed a fee and the Court entered an order allowing the*

fee. This illustrates that both the District Court and the Commission *did not apply the test of success as a prerequisite to compensation, but the bona fide efforts of the litigants to obtain a better plan for the class whom they represented.* It is true that in determining the *amount* of compensation the success or failure of success must be considered, but this is only *one of the elements.* In fact, this view was adopted by the Commission in its report. The Commission said (R. 70):

"In fixing the maximum limits of allowances to be paid out of the debtor's estate, we will give consideration, *among other things*, to the *benefits derived by the debtor's estate from the several services performed.*"

It should be noted that the benefits was only *one* of the elements which the Commission considered.

The same view was taken by this Court in *Albert Dickinson Co. v. Dickinson Industrial Site*, 104 F. (2) 771. At page 775, it said:

"In order that such reorganization take place, it was necessary for the bondholders themselves, or for attorneys representing them, or both, to render certain services. *That there is much false and foolish action of no benefit to the debtor estates and devoid of intelligence and good faith in many cases brought under Section 77B, does not affect the rule that compensation is due and should be awarded to those who render services of merit.*"

In another case (*Re Irving-Austin Building Corp.*, 100 F. (2) 574) attorneys who prosecuted an action for fraud were allowed \$1800.00 for their services although they were unsuccessful in their efforts, on the ground that although they were unsuccessful in their efforts they were entitled to recover because they performed their services in good faith.

Where intervenors participate in reorganization proceedings and *endeavor in good faith to procure better results* for the class, they are entitled to compensation irrespective of the success or failure of success in their efforts, and that *the success is to be considered only as to the amount to be allowed* but not on the question whether any allowance should be made. An intervenor who in good faith urged the adoption of a better plan would be entitled to larger compensation if he succeeded in his efforts and to a smaller compensation if he did not succeed but would not be deprived of *any* compensation.

The adoption of a different rule would circumvent the intent of Congress that creditors should participate in reorganization proceedings. A creditor could not know in advance whether he would be successful and no one would risk to come into a proceeding and incur expenses and be represented by counsel if the reimbursement of the expenses would depend upon success of the efforts. In the *New Haven* case (46 F. Supp. 236), the Court said (p. 240):

"Moreover, the restriction of allowances to inadequate dimensions would tend to nullify the policy of the Act to encourage responsible credit and class participation in reorganizations. This policy, in a sense, is paramount to the policy of economy in administration; were it otherwise, the Act would have prohibited all allowances of compensation to the parties of the estate."

This applies with greater force to the power of the Commission to deny any compensation or reimbursement of expenses because of the failure to prevail.

(a) Section 77, as distinguished from 77B, authorizes allowances of expenses to parties and fees to their attorneys, regardless of benefits rendered to the estate.

The report of the Commission is based upon a misconception of law that under §77 parties and their attorneys are not entitled to their expenses if no benefit resulted to the estate and is inconsistent with its report relating to the other intervenors as shown above. The benefits resulting to the estate is a factor in determining the amount of the compensation but is not to be considered on the question whether *any* compensation or expenses should be allowed.

(1) There is no requirement under Section 77 that attorneys representing creditors succeed in their efforts in order to entitle them to compensation.

We have shown above that the intervenors and their counsel, the petitioners, have made valuable contributions to the estate. But, even if no benefits resulted to the estate, they were still entitled to the reimbursement of the expenses and to the compensation for their counsel. The Commission based its decision on the rule applicable to Section 77B which has no application to Section 77.

Section 77B requires that parties representing creditors *contribute beneficially to the estate. There is no such requirement under Section 77. The Section authorized compensation to attorneys representing creditors without regard as to whether the attorneys are successful or not.* The question is only whether they were let in to represent creditors who were parties to the record and whether they represented them in good faith on matters in which their rights were involved. All creditors who participated

in bringing about the submission of the plan are entitled to reimbursement for the expenses and the reasonable compensation of their attorneys. The fact that the Court and the Commission allowed the intervention is to be considered in favor of the allowance of expenses and fees (*Steere v. Baldwin Locomotive Works*, 98 F. (2) 889).

Under 77B the plan is approved by the creditors in *advance* and the approval of the court follows. Therefore, unless the parties contributed something constructive to the modification of the plan which was approved by the creditors they should not be entitled to compensation. The situation under Section 77 is different as the Act provides *that the plan is first to be approved by the Commission and by the court before it is submitted to the creditors.*

In Section 77B the allowance can only be made *after the approval of the plan by the creditors and by the court*, while under Section 77 *the allowance can be made even if the plan is rejected by the creditors and the court*. It is apparent therefrom that *the compensation under 77 is not measured by the approval or disapproval of the plan or by the contributions to the approval of the plan but by the services rendered leading up to the submission of the plan, regardless of its final success*. Section 77 (e) (12) allows compensation "for the actual and reasonable expenses, including reasonable attorneys' fees incurred in connection with the proceedings and plan." It is *not conditioned upon a contribution to the final adoption of the plan*. The disallowance of the expenses of these intervenors and the fees of their counsel is based on the *mistaken conception* that the law applicable to Section 77B is also applicable to Section 77, which is not the case, as shown above. This discussion is, however, only for

academic purposes as appellants did render valuable services to the estate.

(2) Parties to the proceedings or those who were let in by intervention are entitled to their expenses and the reasonable fees for their attorneys, regardless of the success of their efforts.

Section 77(c) (12) authorizes the allowance of expenses of the parties and the compensation of their attorneys. The Court and the Commission had the privilege to deny the intervention and petitioners would not have been parties to the proceedings, and if they performed any services they could not claim reimbursement for expenses and the fees of their attorneys. Both, however, the Court and the Commission, granted the intervention. It must be assumed that they properly exercised their discretion and that the intervention was necessary. Petitioners, therefore, became parties to the proceeding by the orders of the Court and the Commission. The Commission's power was, therefore, limited to fixing a "maximum" amount to expenses and fees, and the functions of the Court were to determine the "reasonableness" of the charges. Neither the Commission nor the Court had the right to deny the total fees and expenses. The rule that the powers of the Court are limited in passing on the reasonableness of the amount but that the Court is without power to deny any amount where the party comes within the Act was squarely held *In Re Building Development Company*, 98 F. (2) 844, C. C. A. 7. There the Court also said (p. 846):

"The rule which clearly is deductible from authorities is that where the party designated by the Act renders services in connection with the proceeding and plan, the court may not, unless some special justification, refuse to allow any compensation whatever."

While the fixing of a maximum allowance is a factual determination which was within the powers of the Commission, *the denial of any compensation requires a judicial determination*, which was not within the power of the Commission. (*Re American Mail Line*, 115 F. (2) 196, 198. We have previously cited the opinion in *re New York, N. H. & H. R. Co.*, 46 Fed. Supp. 214, 219, on the point that it was the intent of Congress that responsible creditor participation in the processes of reorganization should be encouraged. This intent will be stultified if the Commission may fix a minimum limit of "zero" so that the Courts would be helpless to allow compensation even where the services were of great benefit.

The opinion states (Tr. 61) that there is no occasion to "recede" from what it said in the prior appeal, that "no allowance can be had where no benefits resulted to the estate." It was not necessary for the court to *recede* from its former opinion, but only to "define" the word "benefit". If the word "benefit" means "success", then, with the exception of the change in the form of the Voting Trust, and the elimination of the cumulative interest features, petitioners may not have benefited the estate. However, if "benefit" means, participation in a reorganization on behalf of a class in an attempt to obtain more favorable treatment, presented in good faith, and which even resulted in the *reversal* of the approved Plan on appeal (*Abrams, et al. v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 124 F. (2d) 754) then petitioners have *benefited* the estate. True, the Court reversed the decision of the Circuit Court (318 U. S. 523). We were *not successful* on the final appeal. So were other parties unsuccessful.* The attorneys representing the

* Since the decision of this court the Commission filed a supplemental report making many changes which were supported by the Institutional Groups, and by the "Abrams Group".

Protective Committee on behalf of the Common Stock even lost their appeal in this Court. They lost before the Supreme Court of the United States, and yet they were allowed compensation. It must be evident therefrom that the test of "benefit" was not determined by the "success" of the effort, but from the manner of the presentation of the issues for which compensation for services was requested.

The opinion says (Tr. 61) that petitioners have lost sight of the fact that "both in the proceedings in equity and in bankruptcy," it is the "ordinary rule" that attorneys representing creditors, security holders or stockholders must look for compensation to their clients, rather than to the general estate. We have not lost sight of this proposition, but have taken into consideration the fact that § 77(c)12 expressly provided for the compensation of attorneys on behalf of intervenors, and it expressly provides for the payment of expenses. The "ordinary rule" is, therefore, wholly inapplicable.

V.

Rule 52 (a) Was Mandatory Upon the District Court, and Its Order Must Be Reversed Because of the Violation of the Rule.

Rule 52(a) of the new Federal Rules provides that: "The Court shall find the facts specifically and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." The alleged "finding and conclusion" which the Court filed (Tr. 27) is in violation of the Rule.

(a) Rule 52 (a) was mandatory upon the District Court and a reversal must follow for its violation of the rule.

The requirements of the Rule for *specific* findings and *separate* conclusions were held to be *mandatory* (*Shannon v. Retail Clerks Int. P. Ass.*, 128 F. (2) 553, 555). Rule 52(a) is for the benefit of the upper Court and also has "a far more important purpose—that of evoking care on the part of the trial Judge in ascertaining the facts". It is also a "check" on review, so that the reviewing court may determine the correctness of the District Court's findings (*U. S. v. Forness*, 125 F. (2) 928, 942). The rule was made applicable in Bankruptcy (*Perry v. Boumont*, 122 F. (2) 409).

Here, the District Court satisfied itself with the statement (Tr. 27) that it examined the evidence and that the report of the Commission is sustained by substantial evidence. This is *not* in compliance with the Rule, which requires *specific* findings and *separate* conclusions.

(b) Rule 52 (a) is expressly applicable to the instant case.

The only exception in Rule 52(a) dispensing with *specific* findings and *separate* conclusions is concerning a Master's report where the Court may adopt the findings and conclusion of the Master. This is inapplicable to the Report of the Commission which cannot be classed in the category of a report of a Master in Chancery.* A Master in Chancery examines the law and the evidence and his report is *advisory* to the Court. The report of the Commission under §77(e) 12 lacks such characteristics. Its report is *not* advisory as to the allowances and is *controlling* on the *maximum fees*. The *Judicial deter-*

* Here the court did not adopt the findings and conclusions but filed "findings and conclusions". When it exercised its function to file "findings" and "conclusions" it was its duty to file proper findings.

mination, as to the allowance of fees and expenses, within the maximum is to be performed by the court independently of the Commission's report. Therefore, its report does not serve the purpose of the usual report of a Master in Chancery in equity cases. Besides, even a Master's report which does not contain specific findings cannot be the foundation for a judicial determination. Where the Master's report consists of conclusions in lieu of specific findings, *his report cannot be adopted*, and the Court must make findings of its own (*Helper v. Corona Products, Inc.*, 127 F. (2) 612; *Kelley v. Everglades Drainage District*, 319 U. S. 415, 418, 63 S. Ct. 1141, 1144). There, this court held that Rule 52-a is applicable in bankruptcy. The Commission's report also lacked specific findings and merely contained conclusions. The report could not form the basis for the Court's findings. The Commission stated in its report concerning the claim of the petitioners that their services contributed to the abandonment of the unfair plan, that it was "not persuaded that the evidence supports such statement". This was simply a conclusion which the court improperly adopted in lieu of making a specific finding.*

The Court did not point out to any of the evidence which tends to support the report. *In fact, there is no such evidence in the whole record.* No one offered any evidence against the petitioners and no objections were even filed.

The statement of the Court must rest, therefore, on the statement of the Commission that it was not "persuaded" "that the evidence supports" the claim for compensation. This statement of the Commission did not refer to any evidence against the petitioners but to the *alleged weakness in the evidence submitted by the peti-*

* The Commission referred to petitioners' evidence and not to any other evidence. The statement of the court that there is "substantial evidence" cannot be based on such a report.

tioners. Upon the *misconception* that the Commission referred to evidence offered against the petitioners, the Court stated that (Tr. 27) "*there is substantial evidence to sustain the findings*" of the Commission. What was this evidence? *We challenge counsel for the respondents to produce any such evidence.*

If the Court had made specific findings as required under Rule 52(a), it would not have made the *obvious* error.

The Commission based its "maximum limit" of "nothing" on the *failure to be persuaded by petitioners' evidence*. This it had no right to do as *neither a Court nor a Commission may disregard the unimpeached testimony of a witness* (*Kelly v. Jones*, 290 Ill. 375, 378; *Mammina v. Homeland Insurance Co.*, 371 Ill. 555, 560).

The Commission stated (Tr. 27) that it was not "persuaded" that "the evidence" of the petitioners "supports" the statement that they were "primarily responsible for the abandonment of the first plan". The quoted statement appears in the petition (R. 20) slightly different in form. It states:

"Petitioner believes that the evidence adduced by him at the first hearings before the Interstate Commerce Commission was primarily responsible for the abandonment of the first plan."

This *belief* was justified as it appears from the above discussion (pp. 18-27) of the proceeding before the Commission.

It is noteworthy that while Mr. Abrams was cross-examined by the Trustees' counsel (Tr. 20) and by the Examiner (Tr. 22), *not one question was asked of him on this point*, and no one even disputed it. Mr. Abrams testified (Tr. 16):

"When it came to the second hearing, in September 1937, the same witnesses who had originally testified that the plan was equitable, fair and feasible, and who, in answer to my question had so testified, were compelled to admit that the plan was unfair, inequitable and unfeasible."

They were compelled to make their admissions because of the objectionable features which were pointed out by him as shown above (pp. 18-27).

It was stipulated by the parties that all the petitions that were filed by the respective parties and verified, be treated as evidence, subject to cross-examination.* No evidence was offered tending to refute the statement contained in the petition. No cross-examination was had on this subject matter. What "substantial evidence" is there in this record to justify the statement of the court in sustaining Commission's report on the ground that there was such evidence? We call upon respondents to point it out to this Court.

The second point on which the Commission stated that it "was not persuaded" that petitioners' evidence "supports" their statement, was relating to the statement that their efforts contributed to the abandonment of the Voting Trust (Tr. 27). The Court stated that there was "substantial evidence" to support this report. We again challenge the respondents to point to anything in the record tending to justify the court's finding. No such evidence was ever offered.

The only evidence which appears in the record pertaining to petitioners' claim for fees, is the evidence which

* This stipulation is contained in the complete record on the applications of the other parties and the appellees have conceded below that there was such a stipulation and we are sure that they will so concede here.

they offered. Their evidence was also *corroborated* by the proceedings before the Commission, showing that they opposed the Voting Trust (Vol. I, pp. 413-14). They filed specific objections to the Voting Trust which were recommended by the Examiner (R. 17, 18) and the testimony of Mr. Abrams (Tr. 17, 18) was undisputed.

The report of the Commission of February 12, 1940, eliminated the Voting Trust. Counsel for the Trustees brought out by their cross-examination that the Voting Trust was reincorporated in the subsequent report of the Commission of June, 1940. Mr. Abrams, however, pointed out (Tr. 21) that *the new Voting Trust was completely different* from the Voting Trust which was contained in the 1935 plan, in that such Trust gave no representation to the adjustment mortgage bonds, while *the new Voting Trust provided for their representation.* Besides, the petition for fees covered the period up to May 1, 1940, under the order of the Court, and the report of June, 1940, did not affect the services rendered prior to that date which produced the first report eliminating the Voting Trust.

What "substantial evidence" or *any* evidence is there in this record to justify the "findings and conclusions" of the Court on this issue? The entire record of the hearings before the Commission (Vols. I, II, III, IV and V) is now before this Court and was made a part of this record by the stipulation of the parties (Tr. 48) and by the order of this Court (Tr. 52). *Not one word will be found in this record to sustain the alleged "substantial" evidence.*

In deciding that Rule 52(a) was inapplicable, the opinion stresses the point that the question whether the report is sustained by "substantial evidence" presented

"as a matter of law" such question to the District Court, and that it was not a "question of fact", and therefore Rule 52(a) is inapplicable. The Court overlooked the fact that the evidence in this case *was not disputed*. The question therefore was not as "a matter of law" whether the report was sustained by substantial evidence, but as "a matter of fact" whether there was "substantial evidence" to support the report. This was squarely held in *Rassieur et ux. v. Commissioner of Internal Revenue*, 129 F. (2d) 820, 821:

"There is no dispute as to the *evidentiary facts*. The question here is whether the evidentiary facts constitute *substantial evidence* to support the ultimate fact found by the Board, that this stock became worthless prior to taxpayer's tax year of 1933. **This is a question of fact.**" *Helvering v. Ames*, this Court, 71 F. (2d) 939, 943.

In *Labor Board v. Columbian Company*, 306 U. S. 292, the Supreme Court said:

"Section 10(e) of the Act provides ' * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is *substantial*, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. *Washington V. & N. Coal Co. v. National Labor Relations Board*, 301 U. S. 142; *Consolidated Edison Company v. National Labor Relations Board*, 93 F. (2d) 985, 989; *Thompson Products Inc.*, 97 F.(2d) 13; *Rallston-Stillwater Knitting Co. v. National Labor Relations Board*, 98 F. (2d) 758, 764. Substantial evidence, is more than a *scintilla*, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co. v.*

National Labor Relations Board, supra, p. 229, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. See *Baltimore & Ohio R. R. Co. v. Groeger*, 226 U. S. 521, 524; *Gunning v. Cooley*, 281 U. S. 90, 94; *Appalachian Electric Power Co. v. National Labor Relations Board*, *supra*, 989."

There is also a distinction on the question whether a finding is supported by evidence on a motion for directed verdict and a question whether the report of an administrative body is supported by evidence. In the first, the court deals with a question of law, whether there is "any" evidence to support the finding. In the latter, the Court deals with a *question of fact* whether there is "substantial evidence" to support the report. A determination whether there is *substantial evidence* requires consideration of the evidence, which is a *factual question*. 4 Corpus Juris, page 645, § 2538; 5 Corpus Juris, page 26, § 1455.

The Court also overlooked the point that the District Court was not sitting as a court of review of the report of the Commission herein. §77(c)12 conferred the exclusive power and jurisdiction on the Court to make the allowance within the maximum limit as fixed by the Commission. This required the independent judgment of the Court as to the allowance, and therefore it was bound to comply with Rule 52(a), which was made applicable to Bankruptcy cases.

The construction of Rule 52 (a) in the instant case is squarely opposite to the construction of the Rule by the Court of Appeals for the District of Columbia in *Nat. Savings & T. Co. v. Shutack*, rendered December 6, 1943 (F. R. S. 52 a 3).

It is true that in the *Bankers Trust* case (318 U. S. 163) this Court stated that § 77 (e) does not contemplate a hearing *de novo* on the "reasonable worth of the services" or "a reappraisal by the Court of the facts" and that such construction leaves the Court "free to decide" all "questions of law" but this Court did not intend to withdraw from the court the consideration of the "factual" question whether the report is sustained by "substantial evidence" when the evidence was not in dispute. There, the Court said (p. 170):

"Our conclusion is that the function committed by the law to the Commissioner is the ordinary one reposed in a fact finding body and that its findings, supported by evidence, may not be disturbed by a court."

This repels the conception that the court does not pass on factual questions when it examines the undisputed facts to determine whether the report is supported by "substantial evidence" as held in *Rassieur v. Commissioner of Internal Revenue*, 129 F. (2d) 820, 821. This Court determined that the District Court does not hear the matter *de novo*, but it did not hold that in passing on the question whether the report is supported by "substantial evidence" it should not consider the undisputed facts to determine from them whether it supports the report. This more fully appears in the statement of the Court (p. 170):

"At law the jury's verdict settles issues of facts and defines rights, subject only to questions of law. In administrative procedure, all findings of the administrative body may likewise be made conclusive of fact issues, and equally define rights and duties, subject only to questions of law."

At law, where the court passes on the question whether the verdict is supported by *any* evidence, it only passes on "questions of law", but when it passes on the ques-

tion whether it is supported by "substantial evidence" it considers the matter as a *question of fact* (4 Corpus Juris, page 64 *supra*).

In considering the question whether Rule 52(a) was applicable, the court also lost sight of the point that the *report of the Commission contained conclusions* that were barren of any findings of fact and *the court was bound to make findings as required under Rule 52(a)*. The application of Rule 52(a) to such a report, which substituted "conclusions" for "findings" was recently decided in two yet unreported decisions of the District Court of New York (See C. C. H. Bankruptcy Law Service, Pars. 54,484, and 44,490; *In re George R. Burdett, Inc.*, (S. D. N. Y., July 12, 1943), and *In re Ames Furniture Co., Inc.* (E. D. N. Y., June 2, 1943).

CONCLUSION.

Five years of service were performed by the petitioners. There is no dispute about the time spent, the good faith, and the skill in performing the services. Petitioners were the only class of attorneys who were *singled out* with a *maximum reward* of "*nothing*" out of the \$312,624.00 which was allowed (R. 36-38). The *maximum* of "*nothing*" cannot be based on the theory that the services were not beneficial, as this limit was not applied to the attorneys for the preferred stockholders' committee and the attorneys for the common stockholders *who did not contribute any beneficial service to the estate*. Their services consisted only in an attempt to procure benefits for the classes whom they represented in which they did not succeed. Besides, the services of petitioners were of great benefit to the estate.

We will summarize the services performed by the petitioners which were beneficial to the estate which consumed about one thousand hours for a period of five years. The services consist:

.

- (a) Opposing the inequitable 1935 plan, causing its abandonment, and eliminating the inequitable features from the later plans in the following manner:
 - (1) Pointing out that the "cumulative" contingent interest under the General Mortgage operated to make the plan unfeasible.
(Vol. I, p. 415)
 - (2) Urging that the cumulative contingent interest on the fifty-year Mortgage might result in wiping out the new securities to be issued for the Adjustment Mortgage Bonds.
(Vol. I, p. 415)
 - (3) Showing that the complicated capital structure was unsound as the debtor would have emerged from the reorganization as a cripple, being short a million and a half to pay the "fixed" interest, besides the "cumulative" contingent interest.
(Vol. I, p. 403)
 - (4) Petitioners suggested the complete change of the capital structure by the issuance of new securities covering the entire system instead of retaining the complicated structure of the divisional mortgages.
(Vol. I, p. 404)
 - (5) Petitioners opposed the voting trust which deprived the class of Adjustment Mortgage bonds from representation.
(Vol. I, pp. 413, 414)
- (b) Opposition to the 1938 plan, and obtaining Modifications:
 - (1) Opposed the change from 4½% to 5% on the new "B" bonds.
(Vol. II, pp. 821, 822)
 - (2) Opposed New Voting Trust without representation of the Adjustment Mortgage Bondholders.
(R. 17-18)

- (3) Opposed surrender of lien claim of Adjustment Mortgage on "free assets".
(Vol. II, p. 812) (R. 17)
- (4) Urged additional compensation for the surrender of the claim on the "free assets".
(Vol. II, pp. 812-813; R. 17)
- (5) Opposed allotment of common stock without findings as to value.
(R. pp. 18-19)
- (6) Urged allotment of securities for accrued interest to January 1, 1939.
(Vol. II, p. 811)

(e) Aided the Commission in the conduct of the hearings and in having it formulate a plan of its own.
(Vol. II, pp. 666-675)

Objection (a) (1) and (a) (2) were eliminated by the admission of the proponents of the plan that the objections were proper and that the plan which they originally sponsored as fair and feasible, was not feasible and it was necessary to file an amended plan.

(Vol. II, pp. 600, 687)

Point (a) (3) was conceded by the chairman of the Institutional Groups who stated that it was necessary to file a *new* complete plan providing for a *sound* Capital structure.

(Vol. II, p. 725)

Objection (a) (5) was sustained when the Commission rendered its report eliminating the Voting Trust.

(Vol. V, p. 2264)

Objection (b) (1) was sustained when the Commission approved 4½% instead of 5% on the "B" bonds.

(Vol. V, pp. 2232)

Objection (b) (2) was eliminated when the Commission provided that one of the Voting Trustees should be named by the Trustee for the Adjustment Mortgage.

(Vol. III, p. 1314)

Objection (b) (3) was *sustained*, and suggestion (b) (4) was *adopted*, when the Commission allowed 39,000 shares of new common stock for the surrender of the claim on the "free assets".

(Vol. V, pp. 2256-57)

Objection (b) (5) was sustained by this Court when it reversed the decree of the District Court (*Abrams v. Group of Institutional Investors et al.*, 124 F. (2) 754, 765).

The reversal of the decision of this Court by the Supreme Court (*Group of Investors v. Abrams et al.*, 318 U. S. 523), would, of course, not affect the right to the compensation.

Objection (b) (6) was overruled by the District Court but was especially considered and passed upon by the Supreme Court (318 U. S. pp. 523, 573). The good faith in raising this objection is, therefore, not open to challenge.

The aid given to the Commission, as stated under point (c), in the conduct of the hearings, in curtailing the hearings by unnecessary testimony which was based and contained in voluminous exhibits (Vol. II, pp. 674-675) which would have taken up a great deal of time of the Commission and of the respective attorneys, and for which the Commission would have undoubtedly fixed a larger amount for the "maximum limits", was completely

overlooked, when the maximum limit of "nothing" was applied to the appellants.

In urging the denial of the indefinite delay, unless an amended plan would be filed at a short date to be fixed by the Commission, or in the absence thereof, that the Commission should formulate a plan of its own (Vol. II, pp. 667-8), which the Commission sustained when it denied the indefinite postponement and when it adopted a plan of its own (as suggested by petitioners) they, the petitioners, have performed beneficial service to the estate.

The reward of "zero" or "nothing" for such faithful services cannot be sustained by an unbiased tribunal.

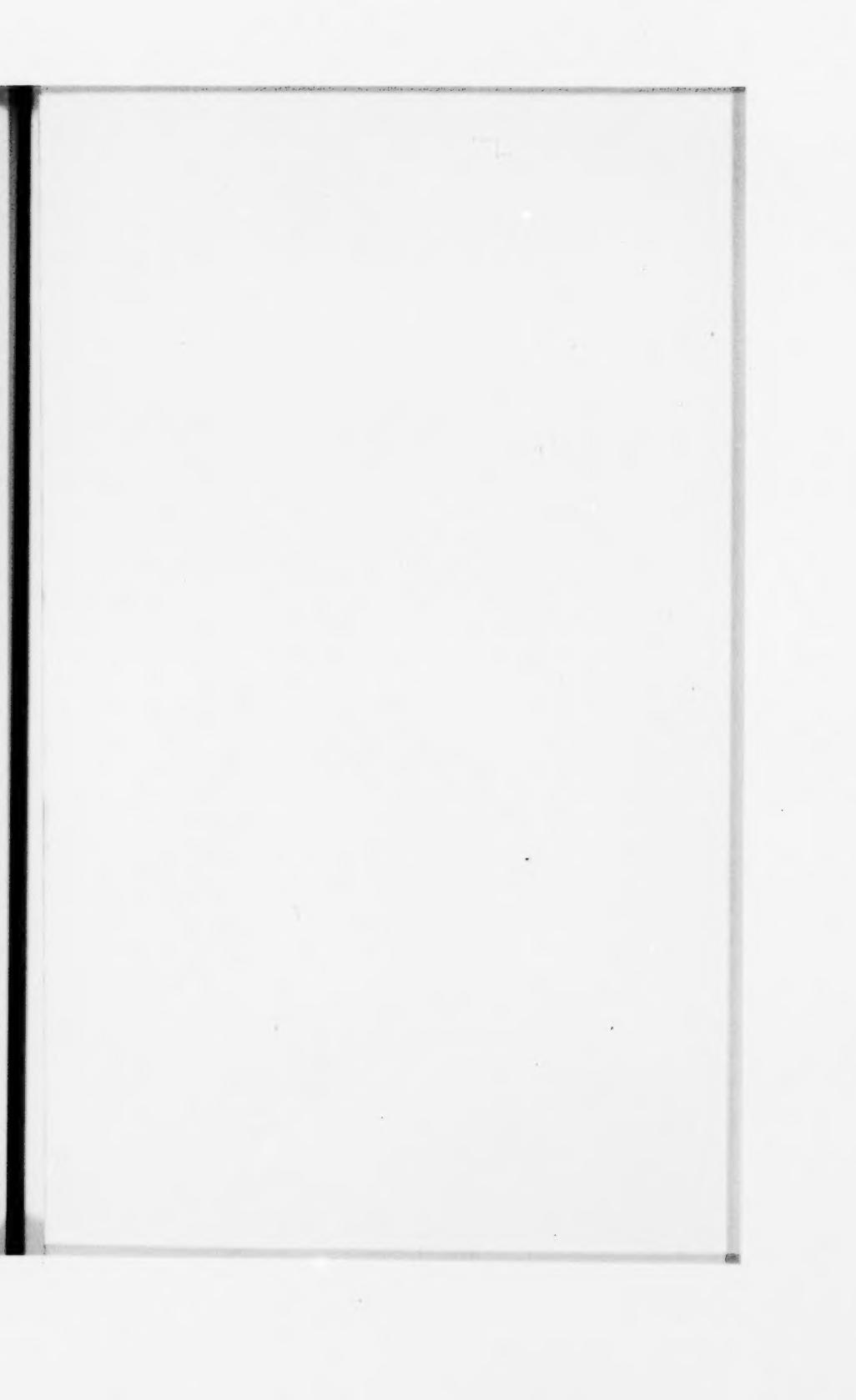
For the reasons urged above, we urge the issuance of the writ so that the order be reversed and that this court may adopt the proposed findings and conclusions and that it may give the proper directions upon remandment.

Respectfully submitted,

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Counsel for Petitioners.

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CHARLES ELMORE DROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 575

ISRAEL A. ABRAMS, ET AL., BERNARD SHULMAN
AND MEYER ABRAMS,

Petitioners,
vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS
AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY
OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

A. N. WHITLOCK,
Counsel for Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Respondents,

888 Union Station,
Chicago 6, Illinois.

January 18, 1944.

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118

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In

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11

INDEX.

	PAGE
Statement of the Case.....	1
Summary of Argument.....	7-8
Argument	9-27
Conclusion	27

LIST OF CASES CITED.

Abrams v. Scandrett, 121 Fed. (2nd) 371.....	3, 5, 8, 19
Abrams v. Scandrett, 138 Fed. (2nd) 433.....	1, 6, 8, 19
Abrams v. Scandrett, 314 U. S. 679.....	4
Abrams v. Scandrett, 314 U. S. 714.....	4
Brown v. Metropolitan Life Ins. Co., 100 Fed. (2nd) 98, 99	7, 15
Dickinson Industrial Site, Inc. v. Cowan, 309 U. S. 382, 388	8, 25
Goodacre v. Panagopoulos, 110 Fed. (2nd) 716, 718.....	7, 15
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251.....	7, 11
In Re Consolidated Motor Parts, Inc., 85 Fed. (2nd) 579, 581	8, 17
In Re New York, New Haven & Hartford R. R. Co., 46 Fed. Supp. 214.....	8, 26
In Re Paramount Publix Corp., 85 Fed. (2nd) 588, 590	8, 25
In Re Porto Rican American Tobacco Co., 117 Fed. (2nd) 599, 601.....	8, 17
In Re Realty Associates Securities Corp., 69 Fed. (2nd) 41, 42.....	8, 25

In Re Tower Building Corporation, 88 Fed. (2nd) 347, 349	8, 17
In Re United Cigar Stores, 21 Fed. Supp. 869, 874.....	8, 17
Magnum Import Co., Inc. v. Coty, 262 U. S. 159.....	7, 11
National Savings and Trust Company v. Shutack, de- cided by U. S. Court of Appeals for District of Co- lumbia on December 6, 1943.....	7, 15
Reconstruction Finance Corporation v. Bankers Trust Company, 318 U. S. 163, 87 L. Ed. 481.....	4, 7, 8, 10, 13, 24
Steere v. Baldwin Locomotive Works, 98 Fed. (2nd) 889, 891	8, 17
Thomas v. Peyser, 118 Fed. (2nd) 369.....	7, 14
Warren v. Palmer, 132 Fed. (2nd) 665-669.....	8, 18

STATUTES CITED.

National Bankruptcy Act—	:
Section 77 (e) (12) U. S. C. A. See. 205 (e) (12) ..	
.....	7, 8, 10, 18, 24, 26, 27
Section 77-B	8, 16, 18
Chapter X	8, 18

COURT RULES CITED.

United States Supreme Court Rules—	
Rule 38	7, 10
Rule XLIX	8, 24
Rules of Civil Procedure—	
Rule 52 (a)	7, 9, 12, 14, 15, 16
Rules Circuit Court of Appeals, Seventh Circuit—	
Rule 27	7, 14

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OCTOBER TERM, A. D. 1943.

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HENRY A. SCANDRETT, WALTER J. CUMMINGS
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OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY,

Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI.**

STATEMENT OF THE CASE.

Petitioners seek to review a judgment (Tr. 62*) of the United States Circuit Court of Appeals for the Seventh Circuit, entered November 4, 1943, (rehearing denied No-

* Page references used herein when preceded by "Tr." indicate the pages of the record in this Cause, No. 575, October Term, 1943; when preceded by "R." indicate pages of the record on the former appeal, C. C. A. Nos. 7529 and 7537, filed herein in Cause No. 631, October Term, 1941; when preceded by volume number, as, for example, "Vol. I", refer to the record in Consolidated Causes, C. C. A. Nos. 7590, 7610-7617, filed herein in Cause Nos. 11-19, 32, October Term, 1942. The consideration of these additional records was authorized by the Circuit Court of Appeals (Tr. 52).

vember 24, 1943, Tr. 63) affirming an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered June 8, 1943, (Tr. 28) in the pending reorganization proceeding under Section 77 of the Bankruptcy Act, of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor. The decision of the Circuit Court of Appeals is reported in 138 Fed. (2nd) 433. The decision of the District Court is not reported.

The order of the District Court (R. 28) overruled for the second time the objections of Petitioners herein to the report (R. 39) and order (R. 76) of the Interstate Commerce Commission of October 2, 1940, fixing maximum limits for allowances for fees and expenses incurred and compensation for services rendered in connection with the proceeding and plan therein and denied the fees and expenses requested by Petitioners.

This case has had a rather long history, has been before the District Court and the Circuit Court of Appeals on two different occasions and was the subject of a prior petition for certiorari addressed to this Court which was denied November 10, 1941. (314 U. S. 679) For a proper understanding of the case a chronological statement is desirable.

Petitioners represent the holders of Convertible Adjustment Mortgage Bonds of the Debtor in the principal amount of \$31,500. (R. 14) Their petition for allowances was filed under Section 77 (e) (12) of the Bankruptcy Act pursuant to an order of the District Court dated April 26, 1940. (R. 10) They asked for an allowance of \$12,500 for services and \$436.80 for expenses. (R. 21) Their petition was referred to the Interstate Commerce Commission along with other similar petitions for the purpose of having determined a maximum limit pursuant to said Section. The Commission, on October 2, 1940, made its report which

contained the following with reference to the claim of Petitioners:

"Shulman, Shulman & Abrams represent holders of \$31,500 of Convertible Adjustment Mortgage Bonds, and performed services and incurred expenses from July 18, 1935. They intervened in the proceeding before the Court and the Commission, participated in hearings before the Commission on a plan of reorganization, filed exceptions to the report of the Examiner on a plan, and filed a petition for modification of the Commission's plan. They participated in the Court proceedings on the question of the appointment of Trustees, examined notices, motions, and petitions, and appeared in Court whenever necessary. They state that their efforts were primarily responsible for the abandonment of the first plan, and the abandonment of the proposal for a Voting Trust. We are not persuaded that the evidence supports such a statement. The firm submitted a statement showing the matters attended to on specific dates, but had no statement of time spent on the work. Its estimate of the time spent is 1,000 hours. We find that the services rendered were of no benefit to the estate." (R. 69)

The Commission's Order in which various maximum limits of allowances are listed provides:

"(q) For services rendered and expenses incurred by Shulman, Shulman & Abrams, representing holders of the Debtor's bonds, nothing." (R. 79)

Petition for modification of this order was denied on November 5, 1940. (R. 116) The District Court, on November 13, 1940, made Findings of Fact and Conclusions of Law and entered its order making allowances to various claimants. (R. 117) On the same day the Court overruled Petitioners' objections to the report and order of the Commission. (R. 124) From that order Petitioners appealed to the Circuit Court of Appeals which affirmed the District Court on May 20, 1941. (*Abrams, et al. v. Scandrett*, 121 Fed. (2nd) 371) Petition for rehearing was

denied by the Circuit Court of Appeals on June 23, 1941. (R. 159)

Thereafter, petition for certiorari to review the decision of the Circuit Court of Appeals was filed in the Supreme Court of the United States and denied on November 10, 1941. (314 U. S. 679) This Court also denied a rehearing on December 8, 1941. (314 U. S. 714)

Thereafter, petition was filed by the Petitioners in the Circuit Court of Appeals for a rehearing which that Court denied on February 18, 1943, (Tr. 7) but, on reconsideration, on March 22, 1943, the Circuit Court of Appeals vacated its order of February 18, 1943, granted a rehearing, recalled its mandate which had been issued, reversed the Cause and remanded it to the District Court "with directions to examine the evidence and determine whether it supports the Commission's findings." (Tr. 7)

The basis of the last decision of the Circuit Court of Appeals, as stated in its opinion, was that it had misconstrued the statute in holding that the District Court was without jurisdiction to review the maximum limit fixed by the Commission and it concluded that in the light of the decision of the Supreme Court of the United States in *Reconstruction Finance Corporation v. Bankers Trust Company*, decided February 8, 1943, (318 U. S. 163) the District Court was in error in declining to examine the evidence and that it should examine it for the purpose of determining whether or not it supported the Commission's finding.

The case went back to the District Court and was argued and submitted by Counsel and taken under advisement by the Court. On June 8, 1943, the District Court filed its Findings and Conclusion, (Tr. 27) which are as follows:

"FINDINGS AND CONCLUSION.

In compliance with the direction contained in the order of the Circuit Court of Appeals (*Abrams, et al.*

v. Scandrett, et al., 121 Fed. (2nd) 371, rehearing allowed March 22, 1943) 'to examine the evidence and determine whether it supports the commission's findings' complained of in that proceeding, I have examined the record of the Interstate Commerce Commission and have determined that there is substantial evidence to sustain the finding made in this matter as set forth in the report of the Interstate Commerce Commission of October 2, 1940, as follows:

'Shulman, Shulman & Abrams represent holders of \$31,500 of Convertible Adjustment Mortgage Bonds, and performed services and incurred expenses from July 18, 1935. They intervened in the proceeding before the Court and the Commission, participated in hearings before the Commission on a plan of reorganization, filed exceptions to the report of the Examiner on a plan, and filed a petition for modification of the Commission's plan. They participated in the Court proceedings on the question of the appointment of Trustees, examined notices, motions, and petitions, and appeared in Court whenever necessary. They state that their efforts were primarily responsible for the abandonment of the first plan, and the abandonment of the proposal for a Voting Trust. We are not persuaded that the evidence supports such a statement. The firm submitted a statement showing the matters attended to on specific dates, but had no statement of time spent on the work. Its estimate of the time spent is 1,000 hours. We find that the services rendered were of no benefit to the estate.'

I therefore conclude that the objections of Shulman, Shulman & Abrams and the intervenors represented by them to the report of the Interstate Commerce Commission, disallowing their claim for fees and expenses, should be overruled and that the order of the commission of October 2, 1940 'for services rendered and expenses incurred by Shulman, Shulman & Abrams, representing holders of Debtor's bonds, nothing', should be sustained.

MICHAEL L. IGUE,
Judge, United States District Court."

On the same day the District Court entered an order again overruling the objections of Petitioners to the report of the Interstate Commerce Commission and sustaining the order of the Commission entered October 2, 1940. (Tr. 28) On June 16, 1943, Counsel for Petitioners filed a motion to vacate the Court's Findings and Conclusion and to adopt other Findings and Conclusions (Tr. 28) which motion was overruled on the 21st day of June, 1943. (Tr. 33)

An appeal was taken by the Petitioners from the order of the District Court entered June 8, 1943, overruling the objections to the report and order of the Commission, and from the order of June 21, 1943, denying the motion to vacate the Court's findings. (Tr. 34) The appeal was heard by the Circuit Court of Appeals which, on November 4, 1943, rendered its opinion (*Abrams, et al., v. Scandrett*, 138 Fed. (2nd) 433—Tr. 56) and entered its judgment (Tr. 62) affirming the District Court. It is to review that judgment that the petition for certiorari has been filed.

SUMMARY OF ARGUMENT.

I.

No Proper Case Is Presented for Review by Certiorari.

Section 77 (c) (12), National Bankruptcy Act.
Reconstruction Finance Corporation v. Bankers Trust Company, 318 U. S. 163; 87 L. Ed. 481.
Rule 38, U. S. Supreme Court Rules.
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251.
Magnum Import Co., Inc. v. Coty, 262 U. S. 159.

II.

There Is No Defect of Findings.

(a) Rule 52(a) has no application and if it had, its requirements were satisfied.

Rule 52(a) of the Rules of Civil Procedure.
Reconstruction Finance Corporation v. Bankers Trust Company, 318 U. S. 163; 87 L. Ed. 481.
Thomas v. Peyser, 118 Fed. (2nd) 369.
Rule 27 of the Circuit Court of Appeals of the Seventh Circuit.
Brown v. Metropolitan Life Ins. Co., 100 Fed. (2nd) 98, 99.
Goodacre v. Panagopoulos, 110 Fed. (2nd) 716, 718.
National Savings and Trust Company v. Shutack, decided by U. S. Court of Appeals for District of Columbia on December 6, 1943.

III.

The Determination of the District Court, Sustained by the Circuit Court of Appeals, Is Supported by the Record.

Section 77-B, National Bankruptcy Act.

Chapter X, National Bankruptcy Act.

In Re Tower Building Corporation, 88 Fed. (2nd) 347, 349.

Steere v. Baldwin Locomotive Works, 98 Fed. (2nd) 889, 891.

In Re United Cigar Stores, 21 Fed. Supp. 869, 874.

In Re Consolidated Motor Parts, Inc., 85 Fed. (2nd) 579, 581.

In Re Porto Rican American Tobacco Co., 117 Fed. (2nd) 599, 601.

Warren v. Palmer, 132 Fed. (2nd) 665-669.

Section 77 (e) (12), National Bankruptcy Act.

Abrams v. Scandrett, 121 Fed. (2nd) 371.

Abrams v. Scandrett, 138 Fed. (2nd) 433.

Reconstruction Finance Corporation v. Bankers Trust Company, 318 U. S. 163; 87 L. Ed. 481.

IV.

The Commission Had Jurisdiction to Fix a Maximum Limit of "Nothing".

Section 77 (e) (12), National Bankruptcy Act: U. S. C. A. Sec. 205 (e) (12).

Rule XLIX, U. S. Supreme Court Rules in Bankruptcy.

Dickinson Industrial Site, Inc., v. Cowan, 309 U. S. 382, 388.

In Re Realty Associates Securities Corp., 69 Fed. (2nd) 41, 42.

In Re Paramount Publix Corp., 85 Fed. (2nd) 588, 590.

In Re New York, New Haven & Hartford R. R. Co., 46 Fed. Supp. 214.

ARGUMENT.

In support of their petition, the Petitioners advance several contentions which may be summarized as follows:

They claim that the report of the Commission, which fixed the maximum in their case at "nothing", was defective in that it lacked basic findings and they suggest that Rule 52(a) of the Rules of Civil Procedure for the District Courts of the United States applies to the report, and similarly they urge that the District Court was required to comply with Rule 52(a) and that it failed to do so and erroneously refused to adopt findings which were proposed in behalf of the Petitioners. It is likewise urged that there is no substantial evidence to support the finding of the Commission that the services rendered by Petitioners were of no value to the Estate. Finally, they urge that the Commission was without jurisdiction to fix a maximum of "nothing". The last two contentions were fully presented in the former petition for certiorari in this same case, filed in this Court in No. 631, October Term, 1941, and denied. Reference to the brief of Petitioners in support of the petition filed at that time will disclose that both of these questions were argued at some length. The same record, so far as evidence is concerned, was presented to this Court then as now and the Court must have concluded that the points were not well taken. As to the matter of findings, insofar as the argument concerns findings made by the Commission, the matter is presented for the first time in the petition for certiorari and its impropriety is suggested. In any event, definite finding of the ultimate and material fact that Petitioners' services were of no benefit to the Estate was made and both the District Court and the Circuit Court of Appeals have held that it was supported by substantial evidence.

All of these questions will be presented briefly in the argument which follows, but, first of all, from the mere statement of the contentions made in behalf of the Petitioners it is submitted that

I.

No Proper Case Is Presented for Review by Certiorari.

It goes without saying that Petitioners are not entitled to review as a matter of right. What we conceive to be their principal contentions are the alleged insufficiency of the evidence to support the Commission's determination of the maximum limit of "nothing" and the alleged lack of jurisdiction of the Commission to fix such a limit.

The action of the Commission has been approved by two reviewing courts and both contentions have been embodied in a previous petition filed in this Court. No question of public importance is presented and it does not appear that the decision of the Circuit Court of Appeals, which Petitioners seek to review, is in conflict with the decision of any other Circuit Court of Appeals. While the claim of Petitioners involves the construction of a federal statute there appears to be no dispute in the authorities as to the proper interpretation. Moreover, this Court, by its own decision, has determined the proper application and interpretation of Section 77 (e) (12) of the Bankruptcy Act under which Petitioners' claim was presented.

Reconstruction Finance Corporation v. Bankers Trust Company, 318 U. S. 163; 87 L. Ed., 481.

Certainly there is no departure shown from the accepted and usual course of judicial proceedings.

It is submitted that Petitioners have not brought themselves within the requirements of Rule 38 of this Court. As this Court has many times pointed out, jurisdiction to

review decisions of inferior courts by certiorari is one which is to be exercised sparingly and only in cases of general importance or in order to secure uniformity of decisions. Such jurisdiction should not be exercised merely to give the defeated party another chance.

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,
240 U. S. 251.

Magnum Import Co., Inc., v. Coty, 262 U. S. 159.

Under the rule and decisions of this Court it is believed that it is apparent from the face of the petition that no case for certiorari is made. However, we shall briefly answer the arguments advanced.

II.

There Is No Defect of Findings.

For the first time Petitioners urge the contention that the Commission's report fixing maximum limits does not contain sufficient findings. The purpose of findings, as set forth in the authorities referred to in the brief supporting the petition, is to make clear the reason for the decision and thus insure against arbitrary action and, at the same time, advise any reviewing authority of the basis of the action taken.

In this case the Commission made a complete report (R. 39) in which it set forth in detail the services rendered and expenses incurred by all claimants, analyzed the work performed and in the order fixed the maximum limit of the allowance to be made in each instance. We have quoted in the Statement of the Case the portions of the report and order relating to the services rendered by Petitioners and it will be noted that the report contains a definite finding by the Commission that the services rendered were of no benefit to the Estate.

Counsel makes some point of the proposition that no specific reference is made to expenses but the expenses claimed were incurred in connection with the rendition of the services and, obviously, if the services were of no benefit, there was no justification for the allowance of the expenses incurred in connection therewith. Both must stand or fall together.

Certainly, the Commission's report could leave no doubt in the mind of even the casual reader as to the basis for the Commission's decision.

(a) *Rule 52(a) has no application and if it had, its requirements were satisfied.*

It is even suggested that Rule 52(a) of the Rules of Civil Procedure should apply to Commission findings. It would seem that the simple answer to that suggestion is that the first of those rules provides that they shall govern the procedure in the District Courts of the United States in all suits of a civil nature at law or in equity with certain stated exceptions. Certainly, proceedings before the Interstate Commerce Commission do not fall within the purview of the rule.

Petitioners also contend that under Rule 52(a) the District Court was required to make findings of fact and conclusions of law and that the action of the Court did not comply with the requirements of that rule.

Rule 52(a) provides that "in all actions tried upon the facts without a jury the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. * * *"

Obviously, the kind of case covered by the rule is the ordinary case which involves the trial of issues of fact by the court sitting without a jury. This case does not fall within that category. Here, the District Court did not

undertake to determine the question of how much or how little should be allowed to a claimant. The scope of its inquiry was limited by the direction of the Circuit Court of Appeals, as set forth in its mandate, to examine the evidence and determine whether or not it supported the Commission's findings. (Tr. 8) The Court tried no issue but, on the contrary, reviewed the action of the Commission in fixing a maximum of "nothing". The Court had no authority to fix a maximum or to change one which had been fixed. The limit of the Court's authority is set forth in *Reconstruction Finance Corporation v. Bankers Trust Company*, 318 U. S., 163; 87 L. Ed. 481, which decision undoubtedly led the Circuit Court of Appeals to reverse its former decision.

This Court, in that case, says:

"We think the Congress did not intend to deny the courts all power of review of Commission action in such cases. The statute plainly requires reference to the Commission of claims of the class under consideration, a hearing by that body, the setting of a maximum and action by the court on the footing of the Commission's report. It does not contemplate a hearing *de novo* on the issue of the reasonable worth of the services rendered or the propriety of the expenses incurred, or a reappraisal by the court of the facts. Moreover the procedure suggested by petitioner does not comport with the evident purpose of Section 77 (e) (12) which appears to treat the court's action with respect to such claims as a matter distinct from his final action on the plan as a whole under Section 77(e).

Our conclusion is that the function committed by the law to the Commission is the ordinary one reposed in a fact finding body and that its findings, supported by evidence, may not be disturbed by a court. This construction of the Act leaves the court free to decide upon the basis of the Commission's report all questions of law. With respect to the amount set as a

maximum the only question of law which can arise is whether there is substantial evidence to support the Commission's finding. If there is not the court may so hold, set aside the finding and return the matter to the Commission."

Under the rule thus announced the only question the District Court undertook to decide was a question of law and the case, therefore, did not present a trial upon the facts. The Court of Appeals for the District of Columbia, in *Thomas v. Peyser*, 118 Fed. (2nd) 369, reached a similar conclusion in a case where the decision was rendered as a result of a motion to dismiss, the Court holding that Rule 52(a) applied only to actions tried upon the facts and does not apply where the only issues determined are issues of law.

If Rule 52(a) had any application in this case, then the Court did everything that reasonably could be done to comply with the rule. It was limited in its action by the mandate of the Circuit Court of Appeals to the determination of one question. The District Court complied strictly with the mandate of the Circuit Court of Appeals. It was not authorized *de novo* to go into the question of reasonable worth of the services or the propriety of the expenses incurred. The question propounded to it was answered simply, briefly and clearly. Had the District Court attempted to go into matters of evidence, it would have violated Rule 27 of the Circuit Court of Appeals of the Seventh Circuit which reads:

"27. *Findings of Fact.* Findings of fact, made by the district court and included in the record on appeal pursuant to the authority expressed in Rules 52(a) and 75(g) of the Federal Rules of Civil Procedure, shall cover only material issues, excluding evidentiary issues as well as argumentative findings."

The principal purpose of any rule requiring findings

is to enable the reviewing court to ascertain the basis for the decision of the court below.

Brown v. Metropolitan Life Ins. Co., 100 Fed. (2nd) 98, 99.

Goodacre v. Panagopoulos, 110 Fed. (2nd) 716, 718.

In the *Brown case* the Court says:

"We held in *Shellman v. Shellman*, 68 App. D. C. 197, 95 F. 2d 108, decided January 10, 1938, that the purpose of the findings contemplated under Equity Rule 70 $\frac{1}{2}$ of the Supreme Court, 28 U. S. C. A. following Section 723, is to enable this court to ascertain the basis for the determination below, and where this court can readily understand the questions presented precise findings are not absolutely essential. While Equity Rule 70 $\frac{1}{2}$ requires findings of fact by the district judge, in the case at bar we are able to know the basis of the determination by the lower court, and, as in the *Shellman Case*, *supra*, we will decide this case, even though the proper findings of fact were not made."

The Court was there considering Equity Rule 70 $\frac{1}{2}$ which is the predecessor of Rule 52(a) and the rule of the case was applied in the *Goodacre case*, which arose under Rule 52(a). The findings and conclusion of the Court in this case clearly comply with the requirements of the rule as thus announced.

We find nothing in the case of *National Savings and Trust Company v. Shutack*, decided by the United States Court of Appeals for the District of Columbia on December 6, 1943, and cited by Petitioners, which is contrary to the construction of the rule adopted by the Circuit Court of Appeals. In that case the court denied a petition for instructions without making any findings and the Appellate Court stated that it was impossible to determine why the court acted as it did. No

such situation exists in this case, either as to the proceeding involved or the action taken.

It is, therefore, respectfully submitted that the District Court was not required to comply with Rule 52(a) but in fact did comply therewith in that it passed definitely upon the one question that was submitted to it and fully advised the Circuit Court of Appeals as to the basis for its conclusion.

III.

The Determination of the District Court, Sustained by the Circuit Court of Appeals, Is Supported by the Record.

Both the District Court and the Circuit Court of Appeals have held that the finding of the Commission that the services rendered by Petitioners were of no value to the Estate was supported by substantial evidence.

Counsel argues that it is not disputed that they performed certain services and incurred certain expenses and that, therefore, they are entitled to some compensation. Apparently, it is the view of Counsel that if a party is allowed to intervene and does some work, he should receive something, regardless of whether or not the work contributed in any way to the Plan of Reorganization or was in any way beneficial to the Trust Estate. Such is not the rule and if it were it would authorize compensation to anyone who was active enough to bring about intervention, attend hearings and do some work in connection therewith.

Most of the cases involving compensation which have come to the Appellate Courts are cases which have arisen in connection with the bankruptcy of corporations other than railroads. There are many of such cases which have arisen under Section 77-B or Chapter X proceedings. The following cases illustrate the true rule to be followed in

determining whether or not services are compensable from the funds of the Trust Estate:

In Re Tower Building Corporation, 88 Fed. (2nd) 347, 349.

Steere v. Baldwin Locomotive Works, 98 Fed. (2nd) 889, 891.

In Re United Cigar Stores, 21 Fed. Supp. 869, 874.

In Re Consolidated Motor Parts, Inc., 85 Fed. (2nd) 579, 581.

In Re Porto Rican American Tobacco Co., 117 Fed. (2nd) 599.

In the *Tower Building case*, in discussing the matter of allowance by the District Court in a Section 77-B proceeding, the Court said:—

“The Court, under the statute, must determine, if any services have been rendered which have been of benefit to the estate, which have contributed to the promotion of the purposes of the legislation, the promulgation and adoption of a feasible plan of reorganization.”

In the *Baldwin Locomotive case*, the Court said:

“It is equally well settled that compensation may not be allowed under the act to anyone for services which have not contributed directly and materially to the successful accomplishment of the debtor's reorganization. *In re National Lock Co.*, 7 Cir., 82 F. 2d 600; *Teasdale v. Sefton Nat. Fibre Can Co.*, 8 Cir., 85 F. 2d 379, 107 A. L. R. 531; *Straus v. Baker Co.*, 5 Cir., 87 F. 2d 401; *Birrell v. Great Lakes Utilities Corporation*, 3 Cir., 96 F. 2d 767.”

The Circuit Court of Appeals of the Second Circuit, in the *Porto Rican case*, aptly stated that “it cannot be supposed that in all such cases the Estate is to pay for unnecessary services.” (117 Fed. (2nd), 601.)

It has been contended that the rule announced by these cases does not apply in a Section 77 proceeding but that

contention was set at rest by the Circuit Court of Appeals of the Second Circuit in the case of

Warren v. Palmer, 132 Fed. (2nd) 665,

which arose in a Section 77 proceeding and involved the construction of Section 77 (c) (12) relating to allowances. The case squarely holds that the rule of Section 77-B applies, that to be compensable the service must be of benefit to the Estate or contribute in some substantial manner to the proceedings or the plan. The following extracts from the opinion of the Court are enlightening:

"Although judicial interpretation of Section 77, sub. c (12), is conspicuously absent, it is so akin, both in its terms and in its context, to a provision applicable—before the recent amendments—in reorganization proceedings, Section 77-B, sub. c (9), that cases decided under the latter statute may be adopted as ruling analogies." (132 Fed. (2nd) 667, 668.)

"The criterion of reasonableness under Section 77-B, sub. c (9), was *benefit* to the estate under administration or contribution in some substantial manner to the 'working out' of a plan of reorganization. (Citing cases.) Differently stated, the services or expenses for which compensation or reimbursement was sought must have been of benefit to all the sets of interests in the estate. Activities which only increased the share of one class of creditors at the expense of other creditors have not been considered to benefit the estate or to contribute to the plan." (Citing cases.) (132 Fed. (2nd) 668.)

"Petitioners also assert that they were required to keep in constant touch with the various plans proposed because of their interests and claim reimbursement for those activities. But this court has declared that 'mere participation in the hearings * * * or offering advice, suggestions or criticism regarding the proposed plan, or on matters of procedure, does not give rise to any claim for compensation from the estate.' " (132 Fed. (2nd) 669.)

The Circuit Court of Appeals took the same view in its first decision in this case—

Abrams v. Scandrett, 121 Fed. (2nd) 371,

and it is apparent from its last opinion that it still entertains that view. (Tr. 60.—138 Fed. (2nd) 433)

In considering the evidence it must be remembered that the Petitioners here were the claimants and the burden was upon them to show that they rendered services which were beneficial to the Estate and contributed to the Plan of Reorganization. It could hardly be expected that the record would disclose direct testimony from a witness to the effect that what the Petitioners did was of no benefit and that is the type of evidence that Petitioners seem to think should appear in order to support the finding of the Commission. What the record does show, and shows with clarity, is that the class of bondholders in which the Petitioners belong was represented by other parties to the proceeding, and particularly by the Trustee under the mortgage, and that such changes as were made in the Plan were made either by the representatives of the Debtor, who proposed the initial Plan, or at the instance of other parties than the Petitioners.

We shall not burden the Court by discussing the voluminous record of the proceeding in detail, but will refer briefly to the particular contributions claimed by Petitioners.

They contend that their objection to the Debtor's Plan of 1935 caused its abandonment and the elimination of many features contained therein. It is admitted that this Debtor's Plan was a standby plan. It is briefly summarized in the report of the Commission appearing in Volume V at page 2182, *et seq.* On page 2183 it is pointed out that certain old bond issues were under that Plan to remain undisturbed as to lien and maturity and the payment of

interest on both groups of bonds was to be made contingent upon earnings being fully cumulative. The first hearings upon this Plan were had in 1935 but no plan was adopted and at a subsequent hearing before the Commission on June 16, 1937, at which hearing the Petitioners were not represented, (R. 26) the Debtor announced that it was unable to recommend consummation of the 1935 Plan. Considerable testimony was introduced upon this Plan. At Volume II, page 550, extensive railway statistics and studies in the form of exhibits and otherwise were introduced which were in part designed to bring down to date earlier studies and exhibits and after that was done it was shown, at page 587, that it was recognized that at the time the 1935 Plan was proposed one possible defect therein was the cumulative interest feature of certain mortgage bonds the seriousness of which could be determined only by future developments; that since that time a Committee had been appointed to study the Plan; that the railroad situation was clouded with more uncertainty than was apparent in 1935 and that the Committee concluded that those uncertainties made it inadvisable to recommend the adoption of that Plan. A witness was called in behalf of the Debtor (Volume II, page 600) who advanced the suggestion that a limited cumulative feature could probably be devised which would be adequate to protect the bondholder and at the same time prevent the accumulations reaching a point where they would materially distort the capitalization. The view so expressed was evidently approved by the Committee representing the Group of Institutional Investors since that Committee, on January 10, 1938, (Volume II, page 695) presented a Plan of Reorganization which was the basic Plan from which the Plan ultimately approved by the Commission was worked out. That Plan contains a provision under which none of the old bonds would continue after reorganization but new

bonds would be issued, the income bonds bearing interest cumulative up to a total of 13½%. (Volume V, page 2193) The Plan that was ultimately adopted contains this provision. (Volume III, page 1327)

It is clear, therefore, that this matter of cumulative interest was one that was considered from the beginning, not only by the Debtor but by the Institutional Investors and Savings Bank Groups who formulated the ground work for the ultimate Plan. There is nothing to indicate that Petitioners in any way assisted or cooperated with those Groups in the formulation of any Plan.

The studies referred to in the opinion of the Circuit Court of Appeals included the statistics and exhibits above referred to no part of which was furnished by the Petitioners. These studies were part of the record and they, together with the testimony, a portion of which has been called to the Court's attention, amply support the Commission's conclusion that the credit for such action as was taken with reference to cumulative interest was due to others than the Petitioners.

The same situation exists with reference to the provision as to the Voting Trust. The record shows that the Voting Trust was originally proposed by the Institutional Investors Group. The Commission's own report makes this clear. (Volume V, page 2195) That report also shows that the Debtor objected to the Voting Trust. (Volume V, page 2204) It was likewise objected to by the Trustees of the Adjustment Mortgage, (Volume V, page 2209) but was finally approved in the Commission's report and order. (Volume III, page 1344)

It is claimed that certain objectionable features in the Plan proposed by the Institutional Investors, filed early in 1938, were eliminated by virtue of Petitioners' efforts. The record does not bear this out but shows, on the con-

trary, that such changes as were made in that Plan were in the main those suggested by Counsel for the Debtor. (Volume V, pages 2200-2206)

There is no evidence supporting the contention that Counsel for Petitioners were responsible for the determination by the Commission of the rate of interest on the Series "B" Bonds. On the contrary, the record shows that the interest rate of 4½% on these bonds was in fact recommended in the Debtor's modifications as shown in Exhibit 189, page 7, before the Commission. (Volume II, page 951)

Reference is made to the treatment of free assets of the corporation. Upon this point the Commission, in its report, (Volume V, page 2174) states that the Debtor has no free assets of substantial value except the stock of the Milwaukee Land Company. At the time of all of the hearings before the Commission that stock was pledged and was not free and was in fact released in June, 1938, (Volume V, page 2173) whereas the final hearings before the Commission were concluded on March 22, 1938. The Commission's information as to the free character of the Milwaukee Land Company stock must, therefore, have been obtained from the Annual Reports and other Reports filed with the Commission by the Trustees in the ordinary course. It is obvious that Petitioners accomplished nothing by way of securing allowance for free assets which were not free until after the hearings were closed.

In order that the Court may be advised as to other Groups composed of substantial holders of Adjustment Bonds who were represented in this proceeding it should be stated that the Institutional Investors Group held \$9,757,600 of these bonds. (Volume I, page 536) Thomas Wolstenholme Sons & Company represented certain other owners of Adjustment Bonds and intervened in the pro-

ceeding before the Commission at the first hearing. (Volume V, page 2157) The National City Bank of New York and William W. Hoffman, as Trustees under the Adjustment Mortgage and representing all of the Adjustment Mortgage bondholders, intervened before the Commission on June 16, 1937, and participated in the proceedings thereafter. (Volume II, page 549)

The Debtor's Plan provided that Adjustment Bonds would receive preferred stock on the basis of \$1,000, par value, for each \$1,000 of bonds. (Volume V, page 2184) The Plan proposed by the Institutional Investors provided for one share of no par common stock for each \$100 of claim of Adjustment Bonds for principal and interest. The Plan finally adopted by the Commission provides substantially this treatment without providing for full compensation for the interest. It is clear, therefore, that the treatment accorded the Adjustment Bonds proceeded on a descending curve from the time of the first Plan forward. The Commission, which was in a better position than anyone else to know who had contributed to the Plan, undoubtedly concluded that those things which were done which contributed to the Plan or which benefited the Trust Estate were done by others and not by the Petitioners or their Counsel. It is submitted that the record amply supports that conclusion.

Incidentally, Counsel complains bitterly that the Court below emphasized the fact that the Commission was the best judge of who performed services resulting in benefit to the Estate and asserts that the Court erroneously substituted this assumed knowledge of the Commission for substantial evidence. The Court did no such thing, but it did quite properly refer to the fact that the Commission, which formulated the Plan, was in a better position than anyone else to know who contributed to it. Upon that point

it appears that this Court has expressed the same view as that expressed by the Circuit Court of Appeals. In

Reconstruction Finance Corporation v. Bankers Trust Company, 318 U. S. 163; 87 L. Ed., 481, this Court said:

"Indeed, since most of the services are performed in connection with its activities, it is probably in a better position to judge of their value to the reorganization than any court or other fact finding instrumentality."

The Petitioners devote a great deal of time to the argument that the District Court should have adopted the findings proposed by them. The question involved here is not whether or not some evidence could have been found in the record to support some or all of the findings proposed but it is rather whether or not the evidence supported the finding that was made by the Commission. It would, therefore, seem that this portion of the argument advanced is not relevant to the question involved.

IV.

The Commission Had Jurisdiction to Fix a Maximum Limit of "Nothing".

Petitioners urge that under the statute the Commission was without jurisdiction to fix a maximum limit of "nothing"; that its power was limited to the fixing "of a ceiling within which limits the Court might allow reasonable compensation." It is our position that this contention is wholly without merit. The right to an allowance out of the estate of a railroad in process of reorganization under Section 77 is provided by Section 77 (e) (12) of the Bankruptcy Act. U. S. C. A. Sec. 205 (e) (12). That section provides that any allowances made by the Court must be within maximum limits fixed by the Commission. Rule XLIX of the Rules in Bankruptcy of this Court requires that all applications for allowances shall be submitted to

the Interstate Commerce Commission, which shall determine the maximum limits of such allowances. This Court, in

Dickinson Industrial Site, Inc., v. Cowan, 309 U. S. 382, 388,

has pointed out that the purpose of reorganization statutes in thus regulating allowances to be made from the trust estate was to place such allowances under more effective control. To that end, the fixing of a maximum was entrusted to the Commission, a body skilled in matters affecting railroads and railroad reorganizations and well qualified to pass upon the value of the services rendered in connection therewith.

The right to any allowance out of a bankrupt estate for services rendered in connection with reorganization proceedings and plans did not exist in the absence of statute. This is true generally as to allowances in bankruptcy proceedings.

In Re Realty Associates Securities Corp., 69 Fed. (2nd) 41, 42.

In Re Paramount Publix Corp., 85 Fed. (2nd) 588, 590.

In the *Paramount* case the Court said:

"Both in proceedings in equity and in bankruptcy simpliciter it is the ordinary rule that attorneys representing creditors, security holders, or stockholders must look for compensation to their clients rather than to the general estate. *In re New York Investors* (C. C. A.), 79 F. (2d) 182, 186, certiorari denied; *Endelman v. R. F. C.*, 296 U. S. 649, 56 S. Ct. 308, 80 L. Ed. 462; *In re Realty Associates Securities Corp.* (C. C. A.), 69 F. (2d) 41, certiorari denied; *Bondholders' Committee v. Realty Associates Securities Corp.*, 292 U. S. 628, 54 S. Ct. 631, 78 L. Ed. 1482."

When Section 77 was enacted, the right to allowances was one which Congress could give or withhold. The statute might well have provided that no such allowances

should be made. If that is so, it would seem to follow that Congress could place a limitation upon allowances or could attach conditions thereto. Congress, by Section 77 (e) (12), gave to the Commission express authority to fix maximum limits:

*** The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the Court pursuant to the provisions of paragraph (12) of this subsection (e) ***,"

The validity or propriety of this provision is no longer in doubt and, since it is likewise established that allowances can be made only to those who have made some contribution, it would seem clear that the Commission is authorized to fix maximum limits in all cases and that this power carries with it the right to fix a maximum of "nothing" if the Commission, in the exercise of its judgment, concludes that the services rendered are of no value. Of course, there must be support in the record for the maximum that is fixed, but, so far as the point here under consideration is concerned, the Petitioners' contention would lead to the conclusion that if the Commission fixed a maximum limit of \$10, it would be acting within its jurisdiction, whereas if it fixed a maximum of "nothing", it would be acting beyond its jurisdiction. Such a conclusion finds no support in the authorities and is directly contrary to the clear provisions of the statute and the judicial interpretations thereof.

This is not at all an unusual case. There have been many instances where a maximum limit of "nothing" was fixed. In this very proceeding maximum limits of "nothing" were fixed for certain other claimants. (R. 76-79) In

In Re New York, New Haven & Hartford R. R. Co., 46 Fed. Supp. 214,

upon which Petitioners rely, it will be observed that in several instances maximum limits of "nothing" were

Date

fixed and approved by the trial court. (page 236) To conclude that the Commission cannot fix a maximum of "nothing" would require the Court to read into the statute a requirement that in all cases where a claim is made a maximum limit in some definite amount must be fixed and this though the Commission concludes that the claimant rendered no services whatsoever. This would be legislation and would be clearly contrary to the intention of Congress as announced in Section 77 (e) (12).

Conclusion.

We have tried to answer briefly the arguments advanced in behalf of the Petitioners.

We submit that these Petitioners have had more opportunity than is usually accorded litigants to present their cause. They have been before the District Court and the Circuit Court of Appeals on two occasions and this is the second presentation to this Court of the same case. We further submit that the record fully supports the conclusion reached by the Circuit Court of Appeals and by the District Court; that no showing has been made to entitle Petitioners to a further consideration by this Court and that the petition for certiorari should be denied.

Respectfully submitted,

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888 Union Station,
Chicago, 6, Illinois.

Dated January 18, 1944.



(3)

Office - Supreme Court, U. S.
FILED

JAN 26 1944

CHARLES ELMORE CROPLEY
CLERK

IN THE

**SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, A. D. 1943.

No. 575

ISRAEL A. ABRAMS, ET AL., BERNARD SHULMAN
AND MEYER ABRAMS,

Petitioners,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS
AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY
OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY,

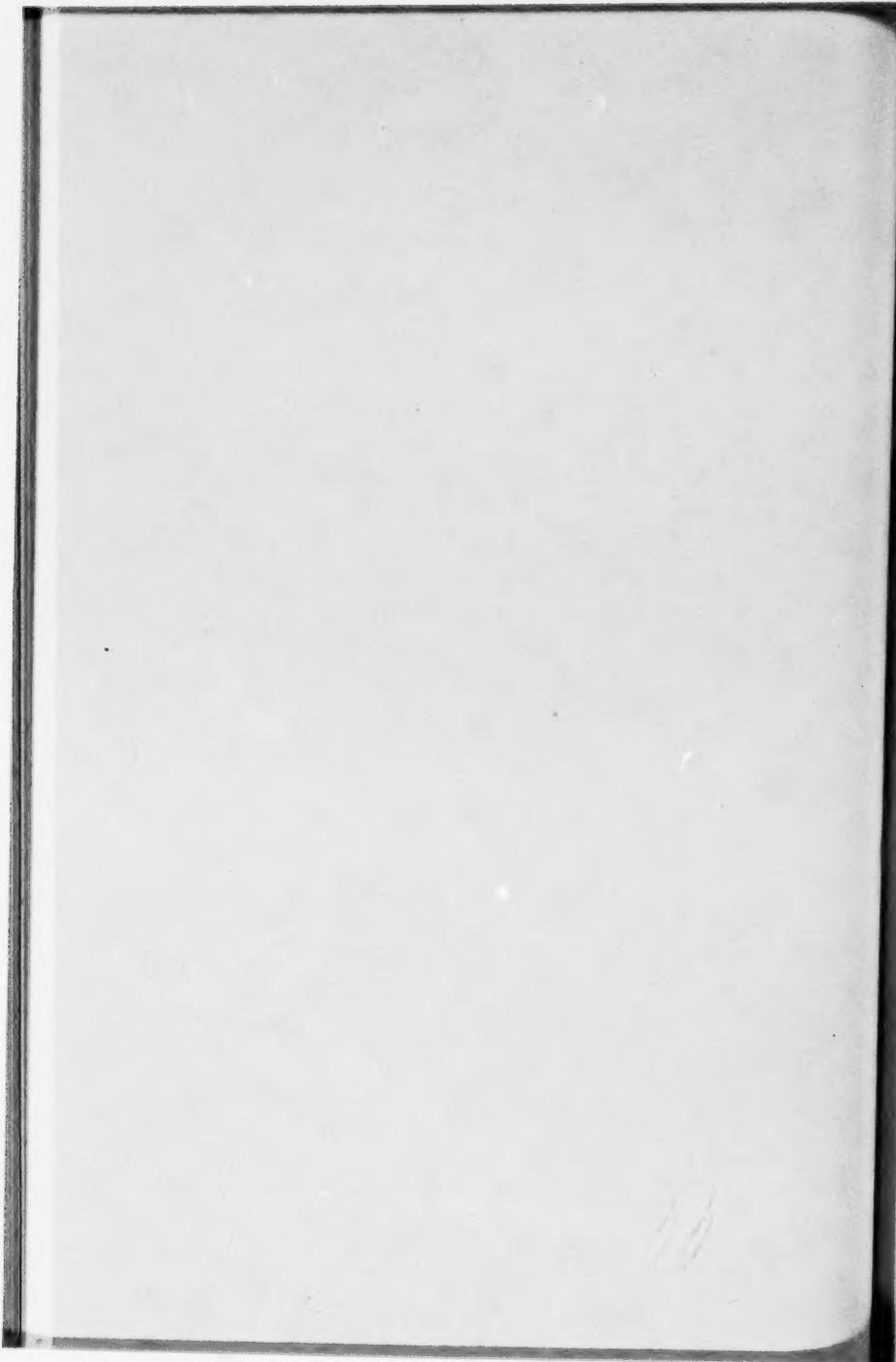
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT.

PETITIONERS' REPLY AND MOTION.

MEYER ABRAMS,
Counsel for Petitioners.

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INDEX.

	PAGE
Reply	1-9
Motion	10

SUMMARY OF REPLY.

I. This is a proper case to review by certiorari.....	2
II. There is a lack of basic findings.....	3
III. The record does not support the judgment below	4
IV. There was no jurisdiction to fix nothing as a maximum	7
V. The unwarranted assumption that the Com- mission was familiar with the facts and that this constitutes the substantial evidence was unjustified by the record.....	8
Conclusion	9

ADDITIONAL CASES CITED.

City of Yonkers v. U. S. and Interstate Commerce Comm., 64 S. Ct. 327.....	3,4
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**PETITIONERS' REPLY AND MOTION FOR LEAVE
TO FILE COPY OF BRIEF AND PETITION
FOR REHEARING FILED BELOW.**

STATEMENT.

Respondents contend that certain issues were not raised below and are presented for the first time in the Petition for a Writ of Certiorari. For the purpose of showing the inaccuracy of their statement, we are moving for leave to

file a copy of Petitioners' Brief and Petition for Rehearing to demonstrate that the questions were raised below.

The statement (p. 9) that "The same record" so far as "evidence is concerned" was presented to this Court "then as now" and the Court "must have concluded that the points were not well taken" is refuted by the opinion on the former appeal (121 F. (2) 371). There, the Court said (R. 155):

"The evidence upon which this finding was made was not before the District Court".

The evidence *was* before the District Court on *this hearing* as it appears in Respondents' marginal note on page 1. In order to supply such evidence on the previous application for the Writ of Certiorari, we moved in this Court for leave to file Volumes I and II which were filed below in Cases Numbers 7590, 7610-7617, but this Court denied the motion. *These volumes are now part of this record* by the stipulation of the parties and by the order of the Court.

The contention (p. 9) that the point that the Report of the Commission lacked basic findings "is presented for the first time in the petition for certiorari" will be demonstrated to be false in the answer to the "argument" and by the motion for leave to file the Brief and the Petition for Rehearing which was filed below.

I.

This Is a Proper Case for Review By Certiorari.

The point that no proper case was presented for review by certiorari is based on the contention that a Writ is *discretionary* and not a matter of *right*. There is no controversy as to this point. In addition to the reasons urged in the Petition for the exercise of discretion to issue the Writ, counsel's contention (p. 12) that Rule 52

(a) is inapplicable to reports of Commissions is the *strongest reason* for the issuance of the Writ. In these days when many of the judicial functions are being performed by quasi-administrative commissions or bureaus, *the application of Rule 52 (a) to findings of such commissions becomes of extreme importance.* It is in the interest of the public that this Rule be made applicable to such commissions. This would seem to be in line with the most recent decision of this Court of January 3, 1944, in *City of Yonkers v. Int. Com. Com.*, 64 S. Ct. 327, as to the *jurisdictional basic findings* on the part of commissions. There, Mr. Justice Douglas, in speaking on behalf of this Court, said (p. 330):

“And the fact that the Commission fails to make a finding * * * does not preclude the reviewing Court from making that determination initially. But we deem it essential * * * for the Court to decline to make that determination without basic jurisdictional finding first having been made by the Commission.”

This Court reversed the Commission because of its failure to make basic findings.

II.

Lack of Basic Findings.

Being in no position to justify the report of the Commission which *lacked basic jurisdictional findings*, Respondents resort to the contention (p. 11) that “for the first time Petitioners urge the contention that the Commission’s report fixing maximum limits does not contain sufficient findings”. To demonstrate the falsity of this contention, we are moving for leave to file instanter a copy of Appellants’ Brief and Petition for Rehearing which was filed below. We direct the attention of this Court to Sub-paragraph (b) of Point I, under “Propositions of Law”, at page 9 of the Brief, to the discussion

thereof at page 14, and to the argument contained at page 15 of the Petition for Rehearing.

The contention (p. 12) that Rule 52 (a) is inapplicable "to Commission findings" on the theory that the Rule applies only to "all suits of a civil nature at law or in equity", and not to Commission reports, is completely without merit for the reason that this Court has held that the Rule is applicable to bankruptcy (*Kelly v. Everglades Drainage District*, 319 U. S. 415-418) and the Commission's report was filed in a bankruptcy proceeding. *The Writ should be issued to decide this important question in Federal administration.*

In *City of Yonkers v. U. S. and Interstate Commerce Commission*, 64 S. Ct. 327, this Court referred to *Florida v. U. S.*, 382 U. S. 194, which was cited in our petition in support of the point that a report of a commission without basic findings cannot be sustained, and it said (p. 330):

"In that case this Court set aside the order of the Commission because of 'lack of basic and essential findings required to support the Commission's order'".

The question whether the Commission made basic findings and whether the Court made such basic findings is fully discussed under Point I in the Petition (pp. 16-19) and under Point II (pp. 19-48). Contrary to the contentions of Respondents, a reading of the opinion in the instant case as compared with the decision of the Court of Appeals for the District of Columbia in *National Savings & Trust Company v. Shutack*, will show that the two decisions cannot be reconciled on the application of Rule 52 (a), and the Writ should be issued to reconcile the two conflicting decisions.

III.

The Record Does Not Support the Judgment Below.

We challenged the Respondents to point to anything in the record which tends to support the conclusion that

there is substantial evidence to sustain the report. The following is their answer to the challenge (p. 19) :

"It could hardly be expected that the record should disclose direct testimony from a witness to the effect that what the Petitioners did was of no benefit and that is the type of evidence that Petitioners seem to think should appear in order to support the finding of the Commission".

This statement should be considered as a *confession* that there is no such evidence. Why it could not be expected that there should be evidence on the point that Petitioners' services were of no benefit is not explained. Respondents could have offered such evidence if they had any, which they now admit that they did not.

In a further effort to meet the challenge they say (p. 19) :

"What the record does show, and shows with clarity, is that the class of bondholders in which the Petitioners belong was represented by other parties to the proceeding, and particularly by the Trustee under the mortgage, and that such changes as were made in the Plan were made either by the representatives of the Debtor, who proposed the initial Plan, or at the instance of other parties than the Petitioners."

The statement that the class which was represented by the Trustee on the hearings concerning the inequitable Plan of 1935, is false because at page 23 of their Brief they say that this Trustee *first intervened* before the Commission on June 16, 1937, and the hearings on the 1935 Plan were *closed before that date*. The objections to the 1935 Plan were heard in 1935, and the hearings are contained in Volumes I and II *prior to the appearance of the Trustee*. The alleged other parties in interest are (1) the Institutional Investors Group and (2) Thomas Wolstenholme Sons & Company, as is specifically stated at page 22 of their Brief. The Institutional Group *spon-*

sored the Debtor's Plan of 1935 which was *opposed* by the Petitioners, so that *this group could not very well have represented the class which opposed the Plan*. The other group merely obtained an intervention, but *did not participate in the hearings*. The entire record, Volumes I to V inclusive, is before this Court, and the *Respondents have not been able to point to one page of the record where this group took any position*. All that they point to in the record (p. 23) is that the Commission mentioned that they intervened. *The mere intervention of a party, without participation in the hearings, does not become a representation of a Class.*

Respondents say (p. 20) that on June 16, 1937, "it was recognized that at the time the 1935 Plan was proposed one possible defect therein was the cumulative interest feature of certain mortgage bonds, the seriousness of which could be determined only by future developments", and that a witness appeared on behalf of the Debtor who advanced the suggestion that a "limited cumulative feature could probably be devised" and "at the same time prevent the accumulations reaching a point where they would materially distort the capitalization". *Where is the evidence in the record that this change of heart by the very people who first sponsored the Plan was not brought about by the evidence, cross-examination, and argument as brought out by Petitioners when the Plan was assailed?* They fail to point to any such evidence. The statement (p. 21) that "it is clear" that "this matter of cumulative interest was one that was considered from the beginning, not only by the Debtor but by the Institutional Investors" is completely false and is *refuted by the record*, it appearing therefrom that both the Debtor and the Institutional Investors sponsored the Plan in the face of the objections then urged by the Petitioners.

The statement (p. 21) that "the Voting Trust was originally proposed by the Institutional Investors Group" and that "*the Debtor objected to the Voting Trust*" is but a *half-truth*. The record shows that the Debtor *proposed* the Voting Trust (Vol. I, p. 33), and at the hearings on the Plan *its witnesses supported the Voting Trust*. The only one that opposed it were the Petitioners. The Debtor did *later* change its position. *This is the half-truth.* The further statement that the Trustee of the Adjustment Mortgage Bonds objected to the Voting Trust is also a *half-truth* because the Trustee appeared on the scene *subsequent* to June 16, 1937, and *after* the Petitioners opposed the Voting Trust.

IV.

Jurisdiction to Fix Nothing As a Maximum.

Counsel do not discuss the authorities cited in the Petition on the Point that "nothing" is not synonymous with "maximum", and that authority to fix a "maximum" cannot be stretched to fixing "nothing" as a maximum. They cite the decision of this Court in *Dickinson Industrial Site, Inc. v. Cowan*, 309 U. S. 382. This decision holds that the allowance of fees calls for a judicial determination and *sound discretion*. If a Commission can fix "nothing" as a "maximum", then the Court is deprived of its judicial functions. It was not the intent of Congress to deprive the Courts of their functions when they conferred the authority on the Commission to *fix* the maximum and the authority on the Courts to make the *allowance* within the maximum. It is evident that the final step, the allowance, was vested in the Courts and not in the Commission, and the Administrative Body was powerless to curtail the function of the Court.

In *City of Yonkers v. Int. Com. Com., supra*, this Court said (p. 330):

"Congress has not left that question exclusively to administrative determination; it has given the Courts the final say".

The construction placed on the statute in the instant case tends to violate the language of the statute and to remove the final "say" from the Courts, and to vest such final determination in the administrative agency.

V.

The Unwarranted Assumption That the Commission Was Familiar With the Facts and That This Constitutes the Substantial Evidence Was Not Justified By the Record.

In answer to the Point that the Court of Appeals substituted an unwarranted assumption in lieu of substantial evidence, which it was unable to find in the record, Respondents say (p. 23) that "The Court did no such thing, but it did quite properly refer to the fact that the Commission which formulated the Plan, was in a better position than anyone else to know who contributed to it". In addition to the argument as it appears in Petitioners' Brief (pp. 37-40) we will quote from the decision of this Court in *City of Yonkers v. Int. Com. Com. Supra*, the following:

"We are asked to presume that the Commission, knowing the limits of its authority, considered this jurisdictional question and decided to act because of its conviction that the branch line was not exempt by reason of §1 (22). But that is to deal too cavalierly with the Congressional mandate and with local interests which are pressing for recognition."

This Court concluded that the report of the Commission must be reviewed and sustained on "affirmative" findings, and not on "inferences".

CONCLUSION.

Respondents say that Petitioners have had more opportunity than is usually accorded litigants to present their cause. This is a true statement, but the opportunity that was afforded to them was never an opportunity to obtain a review on the merits. We were compelled to appeal the first time on the construction of the Statute. We lost the appeal. We lost the application for the Writ of Certiorari in this Court on the *mischief* of the Statute. We were compelled later to seek a rehearing after this Court repudiated the former decision in this case. This rehearing was at first denied. We finally succeeded in getting a rehearing and a reversal, but this led to a mere statement by a District Judge that he read the evidence and that there is substantial evidence to support the report, and we have demonstrated that *there is not even a scintilla of evidence*, and this is *confessed* by Respondents' Brief. The Court of Appeals sustained the ruling below, and we have demonstrated in our brief that there is nothing in the record to support its conclusion, and that it is based on *unwarranted assumptions* instead of substantial evidence.

We are compelled again to seek a review from this Court. The best answer to Respondents' conclusion that we can give is the quotation from Proverbs: "Seven times may the righteous fall, but he will rise up again", and that justice will finally triumph.

For the foregoing reasons we urge the issuance of the Writ.

MAYER ABRAMS,
Counsel for Petitioners.

**MOTION FOR LEAVE TO FILE COPY OF BRIEF AND
PETITION FOR REHEARING FILED BELOW.**

Now come Israel A. Abrams, et al., Petitioners herein, by their counsel, and move for leave to file instanter a copy of Petitioners' Brief and Petition for Rehearing in Case No. 8366 filed below, for the purpose of supporting the statements contained in the Reply Brief and to refute the statements contained in Petitioners' Brief as discussed in the Reply.

MEYER ABRAMS,
Counsel for Petitioners.

State of Illinois,
County of Cook—ss.

Meyer Abrams, being first duly sworn on oath, deposes and says that he is the attorney for the Petitioners in the above entitled cause.

Affiant further states that the Brief and Petition for Rehearing which is presented for filing in connection with the above motion is a true and genuine copy of the original Brief and Petition for Rehearing which is on file in the United States Circuit Court of Appeals for the Seventh Circuit in Case No. 8366, which is the subject matter of the Petition for Writ of Certiorari.

MEYER ABRAMS.

Subscribed and sworn to before me this 24th day of January, A. D. 1944.

YETTA M. GERTLER,
Notary Public.

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